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No. 07-148

In The
Supreme Court of the United States

CONAGRA, INC., CONAGRA FOODS, INC., CONAGRA HIDE DIVISION, CONAGRA BEEF COMPANY, and MONFORT, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, *ex rel.* ALI BAHRANI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act ("FCA") imposes liability on a person who knowingly makes a false statement "to conceal, avoid, or decrease an ***obligation to pay*** or transmit ***money*** or property to the Government." 31 U.S.C. § 3729(a)(7) (emphasis added). The Question Presented is:

> Whether a person, who is required to obtain a certificate from a federal agency to engage in a regulated activity, avoids an obligation under the FCA to pay money to the Government because he engages in the activity without obtaining the necessary certificate or paying the fee associated with it?

PARTIES TO THE PROCEEDING

Petitioners ConAgra, Inc. and ConAgra Foods, Inc. are now collectively known as ConAgra Foods, Inc. ConAgra Foods, Inc. is a publicly traded Delaware corporation. It has no parent corporation, and no publicly traded company owns more than 10 percent of its stock. These Petitioners are represented by Darrell G. Waas, Patricia C. Campbell, and Edward G. Warin.

Petitioners ConAgra Beef Company, ConAgra Hide Division, and Monfort, Inc. are now collectively known as Swift Beef Company. Swift & Company, a Delaware corporation, owns 100 percent of the issued and outstanding stock of Swift Beef Company. JBS S.A., a Brazilian corporation traded on the Sao Paulo stock exchange, is the ultimate parent company. JBS S.A. owns 100 percent of JBS USA, Inc., a Delaware corporation, which owns 100 percent of SFC Subsidiary Holdings, Inc., a Delaware corporation, which owns 100 percent of S&C Holdco 2, Inc., a Delaware corporation, which owns 100 percent of S&C Holdco 3, Inc., a Delaware corporation, which owns 100 percent of Swift & Company. No publicly traded company owns more than 10 percent of JBS S.A.'s stock. These Petitioners are represented by Marie R. Yeates, Charles D. Tetrault, and Carol C. Payne.

Respondent is the United States of America, *ex rel.* Ali Bahrani.

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1 ITION FOR WRIT OF CERTIORARI

Petitioners ConAgra, Inc., ConAgra Foods, Inc., ConAgra Hide Division, ConAgra Beef Company, and Monfort, Inc. request that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit, which vacated the summary judgment granted by the District Court and remanded Respondent's claims under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, for further proceedings.

OPINIONS AND ORDERS BELOW

The Court of Appeals' opinion is attached in the Appendix (cited herein as "***App.***") at App. 1-40. The citation to the Court of Appeals' published opinion is:

> *United States ex rel. Bahrani v. ConAgra, Inc.*, 465 F.3d 1189 (10th Cir. 2006)

The District Court's opinion is attached at App. 41-52. The citation to the District Court's published opinion is:

> *United States ex rel. Bahrani v. ConAgra, Inc.*, 338 F. Supp. 2d 1202 (D. Colo. 2004)

The Court of Appeals' order denying Petitioners' Petition for Rehearing *En Banc*, which is unpublished, is attached at App. 53.

JURISDICTION

The District Court entered final judgment disposing of all claims on October 5, 2004. Respondent Ali Bahrani appealed that judgment to the United States Court of

Appeals for the Tenth Circuit by Notice of Appeal filed October 4, 2004, and by Amended Notice of Appeal filed October 27, 2004. The Court of Appeals entered judgment vacating the District Court's judgment and remanding the case to the District Court on October 12, 2006. App. 1-40. Petitioners filed a timely Petition for Rehearing *En Banc* in the Court of Appeals on October 26, 2006, and the court denied that petition by order dated May 10, 2007. App. 53. This Court has jurisdiction to review the Court of Appeals' decision by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

31 U.S.C. § 3729. **False Claims**

(a) Liability for certain acts. – Any person who –

* * *

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . . [footnote in statute]

Statutory footnote: For updates to dollar amounts, *see* Code of Federal Regulations.

[Effective September 29, 1999, the False Claims Act penalty range was increased to not less than $5,500 and not more than

$11,000 for violations occurring after that date. *See* 28 C.F.R. § 85.3(a)(9).]

The pertinent United States Department of Agriculture regulations are attached hereto in the Appendix. The citations are as follows:

9 C.F.R. § 130.20	App. 54-56.
9 C.F.R. § 156.3, .6, .7	App. 56-59.
9 C.F.R. § 307.4-.6	App. 59-63.
9 C.F.R. § 322.2	App. 63-66.
9 C.F.R. § 391.1-.3	App. 66-67.

STATEMENT OF THE CASE

The Tenth Circuit held that Petitioner ConAgra potentially violated the False Claims Act by failing to pay the fee associated with replacement export certificates that ConAgra never requested and that the Government never provided. Because ConAgra had no "obligation to pay . . . money" for a certificate that was neither requested nor provided, the Court of Appeals' decision contravenes the terms of the statute. 31 U.S.C. § 3729(a)(7). The decision will significantly expand the False Claims Act beyond its intended scope because it effectively transforms the FCA from a statute that prohibits certain well-defined conduct – *i.e.*, making a false record or statement to defraud the Government out of money or property it is owed – into a statute that requires a person to take unspecified affirmative steps to avoid liability. Moreover, the decision directly conflicts with the Eighth Circuit's decision in *United States v. Q International Courier, Inc.*,

131 F.3d 770 (8th Cir. 1997), and the Sixth Circuit's decision in *American Textile Manufacturers Institute v. The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999). This Court should review this important federal question.

A. The Federal Government Issues Export Certificates For Animal Products.

Petitioner ConAgra[1] is involved in a wide variety of agricultural activities, including the exporting of meat and hide products to foreign countries. To facilitate these types of exports, the Government provides certificates to meat and hide exporters certifying the quality of the products. 9 C.F.R. § 156.3 (App. 56-57); 9 C.F.R. § 322.2 (App. 64-66). Two divisions of the Department of Agriculture ("USDA"), *i.e.*, the Animal Plant Health Inspection Safety Service ("APHIS") and the Food Safety Inspection Service ("FSIS"), oversee hide and meat export shipments, respectively, through separate, comprehensive regulatory schemes. *Id.*

1. APHIS regulates the export of hides and, as part of that process, issues export certificates declaring that certain diseases do not exist in the U.S. 9 C.F.R. §§ 156.3, 156.6 (App. 56-58). These certificates are not required by U.S. law. Instead, the Government issues them as an accommodation to exporters of hides because some foreign importing countries require such certificates. *See id.* The

[1] "ConAgra" collectively refers to Petitioners ConAgra, Inc., ConAgra Foods, Inc., ConAgra Hide Division, ConAgra Beef Company, and Monfort, Inc. Certain of these entities were sold after this case was filed, and the new entity was known as Swift & Company. Swift & Company and related entities were then sold again to a Brazilian corporation. For ease of reference, the Petitioners and any successors will be referred to simply as "ConAgra."

exporter is charged a flat fee for issuance of a hide-related certificate, which is intended to reimburse the Government for its costs incurred in providing the certificate. 9 C.F.R. § 130.20 (App. 54-56), § 156.7 (App. 58-59). Thus, the certification process is neither a regulatory requirement nor a profit-making endeavor for the Government.

2. FSIS performs the corresponding functions for meat exports. 9 C.F.R. § 322.2 (App. 64-66). However, while obtaining export certificates for hides is not mandatory, participation in the meat inspection system is typically required by the Government, 21 U.S.C. §§ 615-17 (2002), which does not normally charge for issuing an export certificate, either original or replacement, related to mandatory inspection of meat products. 9 C.F.R. § 307.5 (App. 61-62); § 391.1 (App. 66). However, if the FSIS inspector is required to work after normal hours, or if the exporter requests certain voluntary inspection services that exceed U.S. requirements, the inspector can impose a fee. 9 C.F.R. §§ 307.4-307.6 (App. 59-63); §§ 391.1-391.3 (App. 66-67). Any such fees are intended to cover the Government's costs incurred in issuing the export certificates.

When ConAgra wants to export hides to a country that requires an export certificate, or when ConAgra wants to export any meat products, ConAgra or another entity involved in the shipping process obtains a certificate from the appropriate federal agency. The party requesting the certificate is required to provide specific information about the product being shipped, including the type and amount of the product, the name and address of the recipient, and the shipping container numbers, with all of this information appearing on the certificate. 9 C.F.R. § 322.2(b) (App. 64).

B. In Certain Instances, ConAgra Corrected Certificates It Had Already Obtained From the Federal Agency, Rather Than Obtaining Replacement Certificates.

At times, ConAgra employees, at the direction of federal officials providing the certificates, or because those officials had so directed in the past, made corrections to certificates before shipping. ConAgra employees made these changes when an export certificate contained typographical or other minor errors (*e.g.*, transposed numbers in the container description), or when circumstances had changed to make the original export certificate technically inaccurate (*e.g.*, the shipping date had changed). ConAgra generally corrected export certificates so that the information on the certificate matched the letter of credit issued to the buyer for the transaction. If there were any discrepancies between the export certificate and the letter of credit, however minor, ConAgra would not be paid for the shipment.[2]

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[2] As the District Court noted, "[t]here is no dispute in this case that the alterations or changes at issue were to correct errors in the original certificates, not to insert false information in the place of true." App. 51. Indeed, Bahrani has admitted that all changes were made to make the certificates correct and accurate. *See* Appellees' Supplemental Appendix filed in the Tenth Circuit Court of Appeals, Vol. II, at 360.

C. Respondent Filed this FCA Case Contending that ConAgra Had an Obligation, Within the Meaning of the FCA, to Pay For Replacement Certificates – Even Though ConAgra Never Obtained Such Replacement Certificates.

Respondent Ali Bahrani, a former ConAgra employee, filed this action in May 2000 asserting that ConAgra's alteration of export certificates was improper and that such alteration violated the "reverse false claims" provision of the False Claims Act ("FCA"). *See* 31 U.S.C. § 3729(a)(7). The District Court therefore had federal question jurisdiction under 28 U.S.C. § 1331. Section 3729(a)(7) prohibits a person from knowingly making or using a false statement or record "to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." Thus, a "reverse false claim" differs from a traditional false claim in that the defendant allegedly makes a false statement or record to avoid an obligation *owed to* the Government, rather than submitting a claim to obtain payment *from* the Government.

Here, Bahrani contended that ConAgra employees, upon discovering inaccuracies in export certificates, were required to obtain replacement certificates, rather than simply correcting the existing certificates. By not obtaining the replacement certificates, Bahrani asserted, ConAgra improperly avoided an obligation to obtain the replacement certificates and to pay the fees for such replacement certificates. The Government declined to intervene in the action, and the complaint was unsealed in February 2001.

D. The District Court Held that ConAgra Was Not Required Under Any Statutory or Regulatory Scheme to Obtain Replacement Certificates, But Even If It Were, Such an "Obligation" Could Not Support FCA Liability.

The District Court granted summary judgment for ConAgra on all claims. App. 41-52. The court held that a person cannot violate the reverse-false-claims provision of the FCA unless that person owes an existing obligation to the Government, and that such an obligation must be "a real and legally enforceable duty to pay or transmit money or property to the government . . . that pre-exists the acts [*i.e.*, the acts alleged to have violated the FCA] in which the defendant engages to avoid it." App. 45. The court examined the regulatory provisions relied on by Bahrani and concluded that none of those provisions imposed on ConAgra a legally enforceable obligation to obtain (and, thus, to pay for) a replacement certificate when ConAgra discovered inaccuracies in existing certificates. App. 46-50. The court then concluded that, even if such an obligation to obtain and pay for a replacement certificate arose whenever an existing export certificate was altered, the alteration could not support FCA liability because that "obligation" arose only as a result of that act and did not exist before. App. 50.

E. The Tenth Circuit Held That ConAgra Did Have an "Obligation" to Obtain and to Pay For Replacement Certificates.

The Tenth Circuit vacated the summary judgment and remanded the case to the District Court for further proceedings. App. 1-40. Notably, the Court of Appeals agreed with the District Court that the applicable statutes

and USDA regulations do not set forth any standard for determining when, if ever, an exporter is obligated to obtain replacement export certificates. App. 5, 17. But the Court of Appeals nevertheless concluded, relying on affidavits addressing informal agency practices, that ConAgra was indeed obligated under the FCA's reverse-false-claims provision to obtain a replacement certificate – and to pay any accompanying fee – once ConAgra concluded that an existing certificate needed "major" or "significant" changes. App. 19-21. In reaching this conclusion, the Court of Appeals rejected ConAgra's arguments that (i) there was no requirement to obtain replacement certificates, (ii) ConAgra was not obligated to pay money to the Government for replacement certificates that ConAgra in fact never asked for and that the Government never provided, and (iii) ConAgra had no existing obligation under the FCA at the time ConAgra allegedly made or used the false record (*i.e.*, the altered original export certificate). App. 22-25.

ConAgra timely petitioned for rehearing *en banc*, once again asserting that it owed no existing obligation within the meaning of the reverse-false-claims provision of the FCA. The Court of Appeals denied ConAgra's petition for rehearing *en banc* on May 10, 2007, without opinion. App. 53. ConAgra now files this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit Significantly and Erroneously Expanded the Scope of the Statute With Its Ruling That a Person Makes a False Claim By Failing to Obtain, and Thus Failing to Pay For, a Regulatory Certificate.

The Court of Appeals concluded that ConAgra, upon discovering that an export certificate required "major" or "significant" changes, was required to obtain a replacement certificate to legally export that shipment of goods. App. 19-21. Even if that conclusion were correct (and it is not),[3] the Court of Appeals erroneously held that an obligation ***to obtain*** replacement ***certificates*** equates to an "obligation ***to pay*** or transmit ***money*** or property to the Government" within the meaning of the FCA. *See* 31 U.S.C. § 3729(a)(7) (emphasis added). As discussed below, the reverse-false-claims provision applies only where a person already had a specific legal obligation – ***that was in existence*** at the time that the alleged false statement

[3] The Tenth Circuit's conclusion suffers from numerous errors. For example, the court's opinion acknowledges that the FSIS regulations do not set forth a standard for determining when replacement certificates are required. App. 5, 17. Thus, the court's holding lacks support in any statute or rule. *See, e.g., United States ex rel. Siewick v. Jamieson Science and Engineering, Inc.*, 214 F.3d 1372, 1377-78 (D.C. Cir. 2000) (holding that FCA liability cannot be based on an unsettled legal question). Moreover, APHIS does not require export certificates ***at all*** for hide exports. Rather, the Government issues those certificates as an accommodation to exporters to meet the requirements of some foreign importing countries. *See* 4, *supra*. Thus, an exporter clearly has no obligation to the U.S. Government to obtain a replacement certificate for hide exports. Indeed, the Government has already investigated ConAgra's export certificate practices and has never indicated that ConAgra violated any federal laws governing the issuance and use of those certificates. *See* 20, n.7, *infra*.

or record was made or used – to pay or transmit money or property to the Government. Even if ConAgra violated some other law by correcting original export certificates, rather than obtaining replacement certificates, ConAgra still had no existing obligation to pay money to the Government for replacement certificates that ConAgra in fact never requested and that the Government never provided. The Court of Appeals' extension of the FCA to situations where a person fails to obtain a regulatory permit is contrary to the terms of the FCA and substantially expands the statute's scope far beyond that intended by Congress. The Court of Appeals' decision would turn ordinary regulatory missteps into potential FCA violations.

A. The Court of Appeals' Decision Contravenes the Statute By Holding that an Obligation to Do Something Other Than to "Pay or Transmit Money or Property" Can Equate to an Obligation Within the Meaning of the FCA.

From the prior appellate decisions that have addressed the issue of what constitutes an "obligation" within the meaning of the FCA, at least two principles have emerged.[4] *First*, such an obligation must be a specific, legally enforceable payment obligation owed to the Government. *United States v. Q International Courier,*

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[4] *See United States v. Q International Courier, Inc.*, 131 F.3d 770, 773 (8th Cir. 1997); *American Textile Manufs. Inst. v. The Limited, Inc.*, 190 F.3d 729, 736 (6th Cir. 1999); *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 651 (5th Cir. 2004); *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236-38 (11th Cir. 1999).

Inc., 131 F.3d 770, 773 (8th Cir. 1997); *American Textile Manufs. Inst. v. The Limited, Inc.*, 190 F.3d 729, 736 (6th Cir. 1999). The Sixth and Eighth Circuits characterized the required obligation as one sufficiently certain to give rise to an action of debt at common law. 131 F.3d at 773; 190 F.3d at 736.

Second, the obligation to pay money or transmit property must have existed *before* the alleged false record or statement was made or used; it cannot be a contingent obligation that might arise in the future. *Q International*, 131 F.3d at 773 (holding that the reverse-false-claims provision of the FCA applies only if the Government was owed "a specific, legal obligation at the time that the alleged false record or statement was made"); *American Textile*, 190 F.3d at 734 (holding that "a plaintiff may not state a reverse false claim unless the pertinent obligation attached *before* the defendant made or used the false record or statement") (emphasis in original); *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 657 (5th Cir. 2004) (concluding that potential fines and penalties that might be imposed on a defendant subsequent to the false reporting could not constitute an "obligation" within the meaning of the FCA).

These principles are supported by the statute's legislative history, which twice characterizes the statutorily mandated "obligation to pay" as "money owed the Government." S. Rep. No. 99-345, at 15, 18, *reprinted in* 1986 U.S.C.C.A.N., at 5280, 5283. As the Eighth Circuit correctly reasoned in *Q International*, "[t]he deliberate use of the certain, indicative, past tense suggests that Congress intended the reverse false claims provision to apply only to *existing* legal duties to pay or deliver property." 131 F.3d at 773 (emphasis added). The author of

the leading treatise on the FCA concluded (before the Tenth Circuit's decision in this case) that "[i]t now appears to be widely accepted that the Section 3729(a) 'obligation' is limited to present, existing duties to pay the government and does not cover 'potential' or 'future' obligations." John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS, Vol. 1, § 2.01[G] at 2-51 (3d ed. 2005).

The Tenth Circuit, while acknowledging these settled principles, App. 8-10, erroneously concluded that a preexisting obligation to do something ***other than*** "pay or transmit money or property" equated to an obligation within the meaning of the FCA. The only obligation purportedly imposed on ConAgra in this case was the requirement – allegedly created by USDA regulations and related informal practices – to obtain a replacement certificate to legally export goods if the original certificate required "major" corrections. But ConAgra had no obligation to ***pay*** for a replacement certificate that ConAgra in fact did not request or obtain, irrespective of whether any needed corrections were "major," "minor," or somewhere in between. This is so because the fees that the Government sometimes charges for export certificates are user fees that are triggered, if at all, only when a certificate is requested and issued. *See, e.g.*, 9 C.F.R. § 130.20 (App. 54) ("The person for whom ***the service is provided*** and the person ***requesting the service*** are . . . liable for payment of these users fees.") (emphasis added); 9 C.F.R. § 307.5 (App. 61) ("[A]n exporter shall reimburse [the Government] . . . for the cost of the ***inspection service furnished***. . . .") (emphasis added); 9 C.F.R. § 307.6 (App. 63) ("Each ***recipient*** of overtime or holiday inspections service, or both, shall be billed as provided for in § 391.3. . . .") (emphasis added). The applicable

regulations, which are all phrased in the past tense, impose no obligation on ConAgra to pay money to the Government unless ConAgra requests and the Government provides the services at issue. Thus, the Court of Appeals erred in finding an obligation to pay, within the meaning of the FCA, where ConAgra never actually obtained a replacement certificate and thus was not required to pay money to the Government.[5]

Accordingly, even if ConAgra might have violated *some other law* by correcting export certificates rather than obtaining replacement certificates, ConAgra did not violate the FCA by doing so. *See Q International*, 131 F.3d at 773-74 (holding that, even if the defendants violated postal regulations by not buying the required domestic first-class stamps for their mailings, the defendants had no obligation to pay the cost of the stamps that were never actually acquired, and thus the defendants were not subject to FCA liability); *Zelenka v. NFI Indus.*, 436 F. Supp. 2d 701, 704-05 (D.N.J. 2006) (holding that defendant's false statements allegedly made to avoid federal warehouse inspections and the associated inspection fees did not violate the FCA because the defendant had no obligation to pay fees for inspections that in fact did not occur).

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[5] As noted above, even when the service is requested and provided, inspectors do not always charge a fee for an export certificate for meat products. *See* 5, *supra*.

B. The Tenth Circuit's Erroneous Expansion of the FCA Is Far Reaching and Should Be Addressed by this Court.

The FCA imposes harsh sanctions. A violator could be liable for up to treble damages plus a penalty of up to $11,000 for each separate violation. *See* 31 U.S.C. § 3729(a).[6] Congress reserved these sanctions for situations where a person knowingly presents a false or fraudulent claim for payment to the Government, or knowingly makes a false statement to avoid a preexisting, clearly articulated obligation to pay money or transmit property to the Government.

Under the Court of Appeals' decision, however, the FCA's harsh sanctions may be imposed in a wide variety of circumstances where a person fails to obtain a required regulatory permit or other certificate that has a fee associated with it. Indeed, the Court of Appeals' opinion effectively transforms the FCA from a statute that ***prohibits*** certain conduct – *i.e.*, making a false record or statement to defraud the Government out of money or property that it is owed – into a statute that requires a person to take unspecified ***affirmative*** steps to avoid liability – here, obtaining a replacement export certificate. This approach is unsupported by the statutory language and the legislative history and will significantly expand the FCA's application. Examples of fee-based permits or certificates required by a multitude of federal agencies are numerous and diverse, and the potential expansion of the

[6] Prior to September 29, 1999, the maximum FCA penalty was $10,000 for violations occurring before that date. *See* 28 C.F.R. § 85.3(a)(9).

universe of situations to which the FCA might then apply is far reaching.

For example, if a person alters the expiration date on her expired passport and presents that passport to a customs officer, she would, under the rationale of the Tenth Circuit's opinion, be subject to liability not only for altering the passport, *see* 18 U.S.C. § 1543, but also under the FCA for making a false statement or record to "avoid" an obligation to pay money to the Government (*i.e.*, the passport renewal fee). This would be so even though common sense dictates that the person owes no debt to the Government for a new passport that was never requested or issued.

The Court of Appeals' decision will have wide-ranging applicability in the field of exports alone. There are numerous products for which exporters must obtain a fee-based export certificate from the Government. *See, e.g.*, 7 C.F.R. §§ 33.11, 51.38 (apples); 7 C.F.R. §§ 35.12, 51.38 (grapes); 7 C.F.R. §§ 353.2, 353.7, 354.3 (plants and plant products); 7 C.F.R. §§ 800.17, 800.71, 800.160 (grain); *see also* 21 U.S.C. § 381(e)(4) (providing for voluntary certification that drugs and medical devices being exported meet the requirements of the Food and Drug Act). Many of these regulatory provisions contemplate the issuance of replacement certificates, and payment of the fee for issuance, if the original certificate requires corrections. *See* 7 C.F.R. § 51.20 (pertaining to export certificates for fresh fruits and vegetables, and providing for replacement certificates where original certificate contains errors); 7 C.F.R. § 353.7 (providing for replacement certificates for plants and plant products); 7 C.F.R. § 800.165 (providing for replacement certificates for grain exports). Under the Court of Appeals' decision, any exporter subject to these regulatory

provisions who corrects an existing export certificate, rather than obtaining a replacement certificate and paying an additional fee, will be subject to potential FCA liability, even though the exporter would in fact owe no obligation to the Government for a replacement certificate that was never asked for or issued.

The Tenth Circuit has transformed an Act intended to punish monetary fraud into a "super enforcement" tool that is now available to punish a wide range of regulatory violations that have nothing to do with fraudulent attempts to avoid an existing obligation to pay money or transmit property to the Government. This is an overreaching, erroneous expansion of the FCA that has been rejected by many courts. *See, e.g., United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999) ("[T]he FCA is not an appropriate vehicle for policing technical compliance with administrative regulations."); *United States ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301, 1311 (11th Cir. 2002) ("The False Claims Act does not create liability merely for ... disregard of Government regulations or improper internal policies."); *United States ex rel. Willard v. Humana Health Plan of Texas*, 336 F.3d 375, 381 (5th Cir. 2003) (same); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA."); *Kaminski v. Teledyne Indus.*, 121 F.3d 708, *4 (6th Cir. 1997) (Table) ("[T]he FCA does not provide a remedy for ... violation of procurement regulations."); *United States v. Prabhu*, 442 F. Supp. 2d 1008, 1033 (D. Nev. 2006) ("[T]he FCA is not intended to be some wide-ranging statute to police all types of regulatory or contractual compliance."); *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp.

2d 1034, 1045 (N.D. Ill. 1998), *aff'd*, 183 F.3d 730 (7th Cir. 1999) (recognizing the "well-established principle that the FCA is not a vehicle for regulatory compliance").

That such an expansive reading was intended by the Tenth Circuit is clear from the example that court used to support its decision. Specifically, the court analogized ConAgra to "a motorist who attempts to avoid an annual fee by unlawfully altering the expiration date on a license plate." App. 25. Although such fees are typically paid to state or local governments, rather than to the federal government, those fees, like the user fees at issue in this case, are not owed until the automobile registration is actually renewed. This example illustrates that, under the Court of Appeals' decision, the FCA potentially applies whenever a party fails to obtain a regulatory permit – even though the party owes no money to the Government because the permit was never obtained.

When the FCA is properly applied, liability is based on clear and certain standards. *See, e.g.*, *United States ex rel. Siewick v. Jamieson Science and Engineering, Inc.*, 214 F.3d 1372, 1377-79 (D.C. Cir. 2000) (holding that FCA liability cannot be based on uncertain legal standards); *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996) (same). With respect to the reverse-false-claims provision, a person almost certainly knows whether he or she owes an existing debt to the Government and would be aware that making a false statement to avoid such an obligation could trigger liability. This is as it should be for a statute with a significant punitive component. But under the Court of Appeals' decision, liability is based on vague, indefinite standards. A person who makes an innocent correction to

an existing document may fall prey to the FCA's sanctions simply by failing to obtain a new certificate or permit from a governmental agency. And, even when the requirement for such a certificate or permit is clear, a person's failure to meet this type of regulatory requirement, as discussed above, is simply not the type of knowing fraud that the FCA is intended to address.

Because the type of conduct that will trigger liability under the Court of Appeals' decision is not clearly defined, the decision could lead to inequitable results. Indeed, this case is a perfect example of the inequities that will occur. Bahrani contends that ConAgra is liable for at least $520 million in penalties under the FCA based on ConAgra's failure to obtain thousands of replacement certificates over a ten-year period, yet the Court of Appeals candidly admitted in its opinion that "[t]he regulations do not set forth a standard for determining when [replacement] certificates are required." App. 5. Similarly, the court acknowledged that the USDA directive on which Bahrani relied contains "no language that establishes a standard for determining when an exporter is required to obtain a replacement certificate." App. 17. Rather, the Court of Appeals gleaned a requirement to obtain replacement certificates from affidavits describing certain informal agency practices. App. 17-21. Even then, the Court of Appeals concluded that replacement certificates are not *always* required when an original certificate requires changes, but rather only if the changes are "major" or "significant." App. 21. Then, without stating what qualified as "major" or "significant," the Court of Appeals remanded the case for a retroactive application of this newly-articulated standard. App. 39-40. No person should have to face FCA liability based on such a vague,

ill-defined standard cobbled together after the fact. Yet, that is the state of the law under the Court of Appeals' opinion.[7]

This Court should review the Court of Appeals' significant and erroneous expansion of the FCA.

II. The Court of Appeals' Decision Directly Conflicts With the Eighth Circuit's Decision in *Q International* and the Sixth Circuit's Decision in *American Textile*.

In *Q International*, the Eighth Circuit held that an action taken *to avoid incurring* a government user fee (domestic postage) – even if illegal – cannot give rise to FCA liability where there is no preexisting obligation to pay the postage. 131 F.3d at 773-74. The defendants in that case engaged in a scheme to avoid paying domestic first-class postage by transmitting domestic mail to Barbados by courier, and then mailing the letters from Barbados back to the U.S. addressees. Because of discounted postal rates between Barbados and the U.S., the per-letter cost for this roundabout route was less than the cost of a domestic first-class stamp. *Id.* at 772. The United States argued that postal regulations prohibited this scheme and that the defendant violated the reverse-false-claims provision

[7] The lack of statutory or regulatory support for the Court of Appeals' standard is further demonstrated by the fact that the USDA investigated ConAgra in 1999 – extensively – about the alleged wrongdoing, and never imposed any fines, penalties, sanctions, or even a reprimand. *See* Appellees' Supplemental Appendix filed in the Tenth Circuit Court of Appeals, Vol. I, at 96-107. Thus, the Tenth Circuit has imposed a new standard for obtaining replacement certificates, the violation of which could result in penalties of hundreds of millions of dollars – yet the USDA itself found no wrongdoing.

of the FCA by engaging in it. According to the Government, the defendants owed an obligation to the United States for full domestic postage for each letter, and the defendants improperly attempted to reduce that obligation through their fraudulent scheme. *Id.* at 772.

The Eighth Circuit held, however, that the FCA's reverse-false-claims provision applies only if the Government was owed "a specific, legal obligation at the time that the alleged false record or statement was made," and that the "obligation cannot be merely a potential liability." *Id.* at 773; *see* 11-12, *supra*; *see also American Textile*, 190 F.3d at 734 ("[A] plaintiff may not state a reverse false claim unless the pertinent obligation attached *before* the defendant made or used the false record or statement.") (emphasis in original). The court acknowledged that the defendants "might well" have engaged in activity that violated federal postal statutes, which could give rise to civil penalties, but the court nonetheless held that such conduct did not violate the FCA because the defendants had no preexisting legal obligation to obtain and pay for domestic first-class postage. 131 F.3d at 773. In other words, while the defendants might have been subject to other liability for not buying the required domestic first-class stamps, they had no obligation to pay the cost of the stamps that were never actually acquired, and, consequently, the defendants were not subject to FCA liability. *Id.* at 774.

The circumstances alleged here are analogous. Bahrani contends that ConAgra made and used a false record (the altered export certificate) to avoid incurring a government user fee (the cost of a replacement certificate). But, under *Q International*, even if ConAgra should have obtained replacement certificates to legally export goods,

and even if ConAgra might be subject to other statutory liability for not doing so, ConAgra would not also be subject to FCA liability for engaging in an action that avoided a government fee.

The Court of Appeals attempted to distinguish *Q International* and *American Textile* by noting that the defendants in those cases did not owe an "existing debt" to the Government, but the Court of Appeals failed to appreciate that ConAgra likewise did not owe an existing debt to the Government for replacement certificates that ConAgra never obtained. App. 13. In fact, if the Tenth Circuit's holding were applied to the facts of *Q International*, the result in that case would have been different – the defendants would have been subject to FCA liability because they did not engage in the affirmative act of obtaining and paying for domestic postage, even though the defendants did not owe money for domestic mail service that was neither requested nor provided.

Likewise, the Tenth Circuit's opinion conflicts with the Eighth and Sixth Circuits' requirement that the pertinent obligation to pay money or transfer property to the Government must arise and exist *before* the defendant made or used the alleged false record. *See American Textile*, 190 F.3d at 734; *Q International*, 131 F.3d at 773. As demonstrated above, *see* 13-14, *supra*, ConAgra had no present existing obligation to pay money to the Government until it sought and obtained a replacement certificate. There is no evidence in the record demonstrating that ConAgra (i) sought and obtained a replacement certificate, thereby creating a present and definite obligation to pay money to the Government, and then (ii) created and used a false record to avoid that present and definite obligation. Indeed, because ConAgra

never sought any replacement certificates related to the altered export certificates at issue in this case, such an obligation to pay money to the Government never arose.

In sum, the Tenth Circuit's decision creates a conflict among the circuits and tremendous uncertainty and confusion as to what constitutes an "obligation" under the reverse-false-claims provision of the FCA. As the Sixth Circuit recognized in *American Textile*, allowing the FCA to be used as a tool to punish perceived regulatory violations would vest the FCA with "incredible scope" and "'would have the potential to significantly expand False Claims Act jurisdiction into areas *not* involving the expenditure of Federal funds.'" 190 F.3d at 739 (quoting Boese, *supra*, at 2-39 (1999 Supp.)) (emphasis in original). This is an important federal question that should be addressed and resolved by this Court now. Numerous lower courts have dealt with this issue in the twenty years since Congress enacted the reverse-false-claims provision in 1986. *See* Pub. L. 99-562, § 2(7). The issue has been well framed, analyzed, and developed. Deferring review would only cause uncertainty and confusion, especially in light of the Court of Appeals' decision in this case. Courts and litigants alike would greatly benefit from the Court's resolution of this issue.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, ex rel., ALI BAHRANI,

Plaintiff-Appellant,

v.

CONAGRA, INC.; CONAGRA FOODS, INC.; CONAGRA HIDE DIVISION; CONAGRA BEEF COMPANY; and MONTFORT, INC.,

Defendants-Appellees.

UNITED STATES OF AMERICA,

Amicus Curiae.

No. 04-1407

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 00-K-1077(PAC))

(Filed Oct. 12, 2006)

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Johnson, Robinson, Neff & Ragonetti, P.C.; Edward G. Warin, McGrath, North, Mullin, & Kratz, P.C., L.L.O., Omaha, Nebraska; and Carol C. Payne, Vinson & Elkins, L.L.P., Dallas, Texas, with him on the brief), for the Defendants-Appellees.

Peter D. Keisler, Assistant Attorney General, Douglas N. Letter, Appellate Litigation Counsel, Michael D. Granston and Alan E. Kleinburd, Attorneys, Civil Division, United States Department of Justice, Washington, D.C., for amicus curiae, the United States of America.

Before **HENRY**, **McKAY**, and **TYMKOVICH**, Circuit Judges.

HENRY, Circuit Judge.

Ali Bahrani filed this reverse false claims action against his former employer Conagra, and its related corporations, which are engaged in exporting meat products and animal hides. He alleged that employees at Conagra's Greeley, Colorado office routinely altered export certificates issued by the United States Department of Agriculture (USDA) in order to avoid obtaining replacement certificates for which the company should have paid a fee, in violation of the reverse false claims provision of the False Claims Act, 31 U.S.C. § 3729(a)(7). Mr. Bahrani maintained that by altering the export certificates, Conagra employees "used . . . a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7).

The district court granted summary judgment to Conagra, reasoning that Conagra's alleged "obligation" to obtain the replacement certificates was not "quantifiable and existing before the allegedly fraudulent acts taken to avoid it." *See United States ex rel. Bahrani v. Conagra, Inc.*, 338 F. Supp. 2d 1202, 1207 (D. Colo. 2004). We disagree with the district court's reasoning. The record indicates that, as to a certain class of errors and omissions in export certificates – those deemed "major" or "significant" – the USDA required Conagra to obtain replacement certificates and pay the accompanying fee. In our view, that requirement is sufficient to constitute an "obligation" under § 3729(a)(7). Because we are not persuaded by Conagra's arguments that we affirm on alternative grounds, we vacate the district court's grant of summary judgment and remand for further proceedings.

I. BACKGROUND

We begin with an overview of USDA regulations governing export certificates. Then, we summarize Mr. Bahrani's allegations, the applicable provision of the False Claims Act, 31 U.S.C. § 3729(a)(7), and the grounds for the district court's grant of summary judgment to Conagra. We view the record in the light most favorable to Mr. Bahrani. *See Terra Venture, Inc. v. JDN Real Estate Overland Park, L.P.*, 443 F.3d 1240, 1243 (10th Cir. 2006).

A. USDA Export Certificates

To facilitate and promote foreign trade and to protect the food supply, the USDA provides certificates to companies that export animal products. These export certificates are part of a comprehensive scheme administered by the

Food Safety and Inspection Service ("the Food Inspection Service"), which regulates meat exports, and the Animal Plant Health Inspection Safety Service ("the Animal Inspection Service"), which regulates hide exports. *See* 9 C.F.R. §§ 130, 156, 307, 322.2, 350, 351, 390. The regulations are authorized by the Federal Meat Inspection Act, 21 U.S.C. §§ 601-695, the Poultry Products Inspection Act, 21 U.S.C. §§ 451-471, and the Agricultural Marketing Act, 7 U.S.C. §§ 1621-27.

Under the Food Inspection Service regulations, exporters are required to obtain certificates from USDA inspectors for each shipment. Each certificate has a unique serial number and states the shipment's destination, the exporter, the consignee, and the number and kinds of products it contains. 9 C.F.R. § 322.2. The destination may affect the content of the certificates: some countries require more information than the Food Inspection Service does, and, in those instances, the USDA provides exporters with certificates that comply with those other countries' requirements.

The Animal Inspection Service regulations contain a similar provision addressing certificates for exports of animal hides. 9 C.F.R. § 156.3. In contrast to the Food Inspection Service regulations, the Animal Inspection Service regulations do not require a certificate for every shipment. However, some foreign countries do require certificates, and the Animal Inspection Service regulations provide that exporters shipping hides to those countries may obtain a certificate from an inspector.

The Food Inspection Service and the Animal Inspection Service both charge fees for the certificates. The Food Inspection Service's export certificate fee is based upon the

time expended by its inspectors for providing information over and above the minimum certification requirements set forth by federal law. *See* 9 C.F.R. §§ 307.4-307.6, 322.2, 391.1-391.3. In contrast, the Animal Inspection Service charges a flat fee (currently $32). *See id.* § 130.20. The purpose of the fee is to reimburse the government for the costs incurred.

Occasionally, an exporter may discover inaccuracies in an export certificate after it has been issued by a USDA inspector. There may be typographical errors or more substantive deficiencies involving matters such as the grade of beef or the destination of the product. In those instances, the inspectors' practice has been to make corrections on the original certificate themselves, authorize those corrections to be made by the exporters, or to issue a new certificate. The Food Inspection Service's regulations expressly provide for such new certificates. *See id.* § 322.2(c) (setting forth the requirements for "in lieu of" certificates). The Animal Inspection Service's regulations do not contain a similar provision. However, the record indicates that, in certain instances, its inspectors do issue replacement certificates when the original certificates are inaccurate. Although there is not a separate provision addressing the payment of fees for these "in lieu of" and replacement certificates, the parties do not dispute that the regulations authorize the Food Inspection Service and the Animal Inspection Service to charge fees for them.

The regulations do not set forth a standard for determining when these "in lieu of" and replacement certificates are required. However, both parties have submitted affidavits – from USDA officials and a Conagra employee – agreeing that these certificates are required when the original certificate contains significant errors or omissions.

See Aplt's App. vol. I, at 101 (affidavit of Dr. Mark T. Mina, Mr. Bahrani's expert, stating that new certificates are required for "major" changes); Aple's Supp.App. vol. II, at 375 (affidavit of Brad Schmeh, Conagra's expert, stating that new certificates are required in "situations where the customer needs an entirely different shipment or if the weights used for the hides are completely wrong as opposed to one digit being incorrect or transposed"); *id.* at 385 (affidavit of Mariana Lambert, Conagra's Letter of Credit Manager stating that new certificates are required for "changes to the product information, which would include changes to the number of pelts or pieces, the type of hide, or the weight . . . [or] significant changes to the identification information, including entirely different container numbers or significant changes to the port of loading or port of discharge"); *id.,* at 475 (affidavit of Dr. Claude Nelson, Conagra's expert, stating that new certificates are required when "the customer needs an entirely different shipment, or if the weights used for the hides are completely wrong or the consignee is different from on the original certificate, as opposed to one digit being incorrect or transposed"); *id.* at 278 (affidavit of Dr. Robert Fetzner, Conagra's expert, stating that new certificates are *not* required if the changes are "minor").

B. Mr. Bahrani's Allegations

From 1996 to 1998, Mr. Bahrani worked as a document coordinator at Conagra's Greeley, Colorado facility. According to Mr. Bahrani, when Conagra employees discovered errors and omissions in export certificates, they routinely altered the original certificates or forged new certificates, rather than obtaining "in lieu of" or replacement certificates. Based on his personal experience and

information from co-workers, Mr. Bahrani maintained that Conagra employees altered more than 200 export certificates per week, and that they followed this practice at the company's Greeley facility and at other locations for at least ten years preceding the commencement of this action. According to Mr. Bahrani, by altering the original certificates, Conagra employees avoided the fees that the company would have been required to pay for new certificates. Thus, he asserted, he was entitled to damages under the reverse false claims provision of the False Claims Act, 31 U.S.C. § 3729(a)(7).

C. The False Claims Act

Congress passed the original False Claims Act in 1863 "to combat rampant fraud in Civil War defense contracts." S. Rep. No. 99-345, at 8, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273 (1986). "The Supreme Court has given the statute an expansive reading," *Am. Textile Mfrs. Inst., Inc. v. The Limited, Inc.*, 190 F.3d 729, 733 (6th Cir. 1999), observing that it "covers all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co.*, 390 U.S. 228, 232-33 (1968).

In order "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government," S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, the Act was amended in 1986. The "growing pervasiveness of fraud necessitate[d] modernization of the Government's primary litigative tool." *Id.* at 2, 1986 U.S.C.C.A.N. at 5266.

Section 3729(a)(7), the reverse false claims provision at issue in this case, is one of these new "litigative tool[s]." It provides that any person who

> knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person[.]

31 U.S.C. § 3729(a)(7) (emphasis added). This section was added "to provide that an individual who makes a material misrepresentation to avoid paying money owed the Government would be equally liable under the Act as if he had submitted a false claim to receive money." S. Rep. No. 99-345, at 18, 1986 U.S.C.C.A.N. at 5283. Section 3729(a)(7) is described as a "reverse false claims" provision "because the financial obligation that is the subject of the fraud flows in the opposite of the usual direction." *United States ex rel. Huangyan Imp. & Exp. Corp. v. Nature's Farm Prods., Inc.*, 370 F. Supp. 2d 993, 998 (N.D. Cal. 2005). The provision may be enforced either by the Attorney General or by a private *qui tam* relator suing on the government's behalf. 31 U.S.C. § 3730(a), (b)(1).

Congress did not provide a definition of an "obligation" under § 3729(a)(7). However, despite the fact that "[i]n the abstract, an obligation can be legal, moral or social," *see United States ex rel. S. Prawer & Co. v. Verrill & Dana*, 946 F. Supp. 87, 93-94 (D. Me. 1996), courts have defined the term more narrowly. This circuit has stated that the plaintiff is required to allege that the defendant "had '*an existing legal obligation* to pay or transmit money or property to the government.'" *Kennard v. Comstock Res. Inc.*, 363 F.3d 1039, 1048 (10th Cir. 2004) (quoting *United*

States v. Pemco Aeroplex, Inc., 195 F.3d 1234, 1236-37 (11th Cir. 1999)) (emphasis added) (other internal quotation marks omitted).

There is widespread agreement that the making or using of the false record or statement is not sufficient in itself to create an obligation under § 3729(a)(7). *Am. Textile Mfrs.*, 190 F.3d at 736 (stating that "[w]here an obligation arises if and only if a defendant makes a false statement or files a false claim . . . an action under the False Claims Act will not lie"). Instead, the obligation must arise from some independent legal duty. *See id.* ("[W]hatever the scope of the phrase 'obligation to pay or transmit money or property to the Government,' a plaintiff may not state a reverse false claim unless the pertinent obligation attached before the defendant made or used the false record or statement.") (internal citation omitted); *United States v. Q Int'l Courier, Inc.*, 131 F.3d 770, 773 (8th Cir. 1997) ("To recover under the False Claims Act, we believe that the United States must demonstrate that it was owed a specific, legal obligation at the time that the alleged false record or statement was made, used, or caused to be made or used."); *Huangyan Imp. & Exp.*, 370 F. Supp. 2d at 1000 (characterizing § 3729(a)(7) obligations as "existing debts" and adding that, under the Sixth Circuit's reasoning in *American Textile Manufacturers*, "the emphasis is not so much on the *timing* of the obligation as on its *source*").

Moreover, the fact that the making or using of a false statement or record might result in a fine or a penalty is insufficient to establish a § 3729(a)(7) obligation. *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 657 (5th Cir. 2004) (stating that § 3729(a)(7) "does not extend to the potential or contingent obligations to pay the

government fines or penalties which have not been levied or assessed (and as to which no formal proceedings to do so have been instituted) and which do not arise out of an economic relationship between the government and the defendant (such as a lease or a contract or the like")); *Am. Textile Mfrs.*, 190 F.3d at 738 (stating that § 3729(a)(7) does not apply to "contingent obligations[,] includ[ing] those arising from civil and criminal penalties that impose monetary fines after a finding of wrongdoing: as opposed to quasi-contractual obligations created by statute or regulation" and those that "attach only after the exercise of administrative or prosecutorial discretion, and often after a selection from a range of penalties"); *Q Int'l*, 131 F.2d at 773 (stating that § 3729(a)(7) does not apply to "attempts to avoid potential fines or sanctions"); *Huangyan Imp. & Exp.*, 370 F. Supp. 2d at 1000 (stating that "potential obligations – fines, penalties and the like – that are contingent upon the exercise of some discretion or intervening act by the government are not properly the subject of a suit under [§ 3729(a)(7)]").

There are two primary reasons why potential fines and penalties are not § 3729(a)(7) obligations. First, to apply the statute in that context would unduly broaden it. *See Am. Textile Mfrs.*, 190 F.3d at 739 (noting the "incredible scope" of "permitting suits against any person who makes a false statement to the federal government that he did not commit a statutory or regulatory violation that might have led to the imposition of a fine, payment of liquidated damages, imposition of a tax, or forfeiture of property"). Second, the discretion vested in prosecutors and other government officials to determine whether to seek fines or penalties renders the alleged "obligation"

contingent and thus beyond the reach of the statute. *See Bain,* 386 F.3d at 657; *Am. Textile Mfrs.,* 190 F.3d at 739.

Q International illustrates the kind of obligation that is *not* encompassed by § 3729(a)(7). To take advantage of differences between domestic and international postage rates, the defendant corporation transferred bulk mail from the United States to Barbados for the purpose of remailing the letters individually back into the United States (a practice known as "ABA remail"). The United States Postal Service charged Barbados's postal service as little as one-tenth of the amount that it charged for the same first-class delivery of mail within the United States.

The Eighth Circuit held that no actionable "obligation" was involved. "[T]he statutes and regulations that the United States cites might well support a judgment that one or more of the defendants engaged in illegal and fraudulent activity, but those statutes and regulations do not create a legal duty for the defendants to pay domestic postage." *Q Int'l,* 131 F.3d at 773.

Similarly, in *American Textile Manufacturers*, a national trade association alleged that a corporation had mislabeled Chinese products as coming from Hong Kong or Macau. The plaintiff contended that the mislabeling violated several statutes prohibiting the use of false documents and imposing penalties. According to the plaintiff, "each customs violation created an obligation to pay money to the government" and "the allegedly-false entry documents served to 'conceal, avoid, or decrease' the obligations." 190 F.3d at 734 (quoting § 3729(a)(7)).

In rejecting the plaintiff's assertion that, by mislabeling the goods, the defendant corporation avoided an "obligation," the Sixth Circuit first noted that the alleged

obligation did not exist before the defendant made the allegedly false statements. The court also characterized the alleged violations of the statutes at issue as "[c]ontingent obligations" – those that "will arise only after the exercise of discretion by government actors." *Id.* at 738. Nevertheless, the Sixth Circuit did suggest that a statute or a regulation might create a § 3729(a)(7) "obligation," "at least where the statute or regulation imposes an obligation essentially contractual in nature, such as the imposition of the requirement that those using the Postal Service pay the appropriate rate." *Id.* at 737-38 (internal quotation marks omitted).

In contrast to *Q International* and *American Textile Manufacturers, United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234 (11th Cir. 1999) (en banc), involves an "obligation" sufficient to support a reverse false claim action. A contract between the government and an aircraft maintenance company required the company to advise the government when it was holding property in excess of the requirements of the contract and to make appropriate arrangements to dispose of it – for example by agreeing to purchase the property or to return it to the government. In a reverse false claims action, the government alleged that the maintenance company had submitted an inventory sheet with false information that led the government to undervalue the purchase price that the company should pay for airplane wings. Reversing a panel decision, the en banc court held that the company had "a contractual obligation to account for the full value of any excess government property" sufficient to support a reverse false claim action under § 3729(a)(7). *Id.* at 1237. The fact that the parties had not agreed on a specific purchase price for the wings was not dispositive. *Id.*

These decisions establish a dichotomy between "existing debts," which are covered by the statute, and "contingent penalties," which are not. *See Huangyan Imp. & Exp.*, 370 F. Supp. 2d at 1000. Here, in Mr. Bahrani's reverse false claims action against Conagra, we must decide how to characterize an exporter's obtaining "in lieu of" and replacement certificates and paying the accompanying fee.

D. The District Court's Decision

In granting summary judgment to Conagra, the district court concluded that the statutes and regulations invoked by Mr. Bahrani did not establish that the company was obligated to pay for "in lieu of" or replacement certificates: "None of the statutory or regulatory provisions cited in Bahrani's argument or in his supplemental filings . . . establishes that an exporter is *required* to obtain a replacement certificate every time a change to an existing certificate is made." *Bahrani,* 338 F. Supp. 2d at 1207. Moreover, the court said, even if the regulations required Conagra to obtain new certificates when it discovered errors and omissions, "the act of altering the certificate (rather than requesting a replacement) is not an actionable reverse false claim because that obligation arises only as a result of that act and did not exist before." *Id.* (citing *Am. Textile Mfrs.*, 190 F.3d at 738-39). Finally, the fact that USDA inspectors could exercise their discretion not to require "in lieu of" or replacement certificates indicated that Conagra's "obligation" was a contingent one, and thus not covered by § 3729(a)(7). *Id.* at 1207-08.

II. DISCUSSION

On appeal, Mr. Bahrani challenges the district court's conclusion that Conagra's failure to obtain "in lieu of" and replacement certificates did not constitute an "obligation" under § 3729(a)(7). He also argues that the district court erred by not considering one of his allegations.

Conagra defends the district court's analysis of what constitutes a § 3729(a)(7) obligation and argues in the alternative that the court's grant of summary judgment should be affirmed because (1) its employees merely corrected certificates and did not make false statements; (2) the allegedly false certificates were not presented to the government; and (3) Mr. Bahrani was not an "original source" of the allegations against Conagra.

We review the grant of summary judgment de novo. *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 765 (10th Cir. 2006). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court must examine the record to determine whether any genuine issue of material fact is in dispute, and must construe the facts and reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Holt*, 443 F.3d at 765. "If there is no genuine issue of material fact in dispute, we determine whether the district court correctly applied the substantive law." *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999).

A. Mr. Bahrani's Arguments

We begin with Mr. Bahrani's challenges to the district court's grant of summary judgment. He maintains that: (1) the USDA regulations require exporters to obtain new certificates and pay the accompanying fees when changes must be made after the certificates are signed; (2) by making changes to the original certificates, Conagra employees avoided an existing "obligation" under § 3729(a)(7); and (3) contrary to the district court's reasoning, the discretion vested in USDA officials does not establish that the fees for new certificates are contingent obligations outside the scope of § 3729(a)(7). Mr. Bahrani also argues that (4) the district court failed to consider his independent claim that Conagra's employees also violated § 3729(a)(7) by failing to return original certificates to the USDA when changes were necessary. We consider each argument in turn.

1. The USDA regulations

Mr. Bahrani first challenges the district court's conclusion that the USDA regulations do not create a § 3729(a)(7) obligation to obtain "in lieu of" or replacement certificates. He maintains that "*every time* Conagra alters, changes or corrects USDA export certificates it avoids paying set and established monetary fees to the government." Aplt's Br. at 47 (emphasis in original). In support of this argument, he relies on Food Inspection Service Directive 9000.1 and the affidavit of a former USDA veterinarian, Dr. Mark Mina.

According to Mr. Bahrani, Directive 9000.1 provides that "a certifying official can only initial minor erasures or alterations *before* signing the certificate." *Id.* at 42.

(internal quotation marks omitted). He continues, "The certifying official has only this one opportunity to approve minor alterations after which any discretion he may have had to approve changes is forever extinguished. There are no provisions allowing the certifying official to approve and initial changes after the certificate is signed." *Id.* at 42-43.

Like the district court, we are not persuaded by Mr. Bahrani's reading of the Directive. The relevant sections provide:

> IX. Export Certificates
>
> A. The certifying official receives the appropriate completed export certificate and a copy of the certified application from the exporter. The certifying official verifies that the information on the certificate is the same as the information on the application. If the certifying official has concerns about the information on the application or the certificate, he or she contacts the inspection program employee who signed the application or the exporter to address any concerns.
>
> B. Before signing the certificate, the certifying official:
>
> 1. Checks the certificate for accuracy and corrections.
>
> 2. Checks for attachments and lines-out any unused space.
>
> 3. Unless not acceptable to a foreign country, initials minor erasures or alterations. . . .

X. Replacement Certificates

A. A certificate replacing an original certificate is a re-certification of the product's condition at the time of the initial export certification. A replacement certificate for a lot does not represent the lot's current condition. A replacement certificate may be issued in situations, such as, but not limited to:

1. The original certificate did not carry the required information.

2. The original certificate carried incorrect information.

3. The name of the consignee or exporter has changed.

4. The certificate has been lost.

B. The replacement certificate must be dated with the same date as that shown on the original certificate.

. . . .

Aplt's App. vol. I, at 53-54. Although Directive 9000.1 provides a nonexclusive list of circumstances in which new certificates may be issued, we can find no language that establishes a standard for determining when an exporter is required to obtain a replacement certificate or that bars a USDA inspector from making corrections to a certificate after it has been signed.

The other authority invoked by Mr. Bahrani – Dr. Mina's affidavit – similarly does not support the theory that new certificates are required every time a correction must be made. Dr. Mina does state that:

> Because of the need to maintain the integrity of the USDA export certificates for both animal meats and byproducts (including hides), *any* change, correction, or alteration made to a USDA export certificate after it has been signed by a USDA official is serious and improper. It does not matter what information is changed by a third party (non-USDA official) after the export certificate is signed, just the fact that someone other than the USDA has injected himself/herself into the documentation process creates a breach of integrity in the export documentation process. *Any* third party changes, including but not limited to changes to correct typographical errors, to spell out an abbreviated word, to change an address from a post office box to a street address, or to change a weight, container, or identification number where some numbers are transposed, are strictly forbidden, serious and improper.

Id. at 102-03 (emphasis added).

Nevertheless, Dr. Mina does *not* state that exporters are required to pay a fee every time that changes must be made to a certificate after it has been signed by a USDA inspector. Although he opines that "[n]o USDA employee has the authority to give a third party permission to make *any* changes to export certificates after they have been signed by USDA employees," *id.* at 101 (emphasis added), Dr. Mina further states that "[t]he proper procedure for making changes is to inform the certifying official (inspector or DVM) of the changes that need to be made and the certifying official will initial the change, or *if the changes are major,* he will issue a replacement or in lieu of certificate at the request of the exporter." *Id.* (emphasis added). Thus, no statement from Dr. Mina indicates that the

exporter is required obtain a new certificate and pay a fee when the changes are minor.

Like the district court, we therefore do not agree with Mr. Bahrani's expansive reading of the USDA statutes and regulations. "None of the ... authorities cited in [Mr. Bahrani's] argument ... establishes that an exporter is required to obtain a replacement certificate *every time* a change to an existing certificate is made." *Bahrani,* 338 F. Supp. 2d at 1206 (emphasis added). In particular, if a certificate requires a minor change, there is no indication that the exporter is required to obtain a new certificate and pay the accompanying fee. Although an exporter's making such minor changes to a certificate might subject it to potential fines and penalties for altering a government certificate, *see* 21 U.S.C. §§ 611, 676; 7 U.S.C. § 1622(h), these potential fines and penalties are not § 3729(a)(7) obligations. *See Bain,* 386 F.3d at 657; *Am. Textile Mfrs.,* 190 F.3d at 738; *Q Int'l,* 131 F.3d at 773; *see also* Aplt's Br. at 38-39 (acknowledging that the statutes that establish penalties for impermissibly altering or using altered certificates do not themselves establish § 3729(a)(7) obligations).

Nevertheless, we disagree with the conclusion drawn by the district court from its rejection of Mr. Bahrani's interpretation. The fact that new certificates are not required "every time a change to an existing certificate is made," *Bahrani,* 338 F. Supp. 2d at 1206, does not foreclose the possibility that new certificates (and the accompanying fees) are required in some instances. As we have noted, those instances are described in similar ways by a variety of witnesses. Dr. Mina states that new certificates are required when the changes are "major." *See* Aplt's App. vol. I, at 100. Conagra's witnesses state that new

certificates are required when "the customer needs an entirely different shipment or . . . the weights used for the hides are completely wrong as opposed to one digit being incorrect or transposed[;]" Aple's Supp.App. vol. II, at 475; and when there are "changes to the product information, which would include changes to the number of pelts or pieces, the type of hide, or the weight . . . [or] significant changes to the identification information, including entirely different container numbers or significant changes to the port of loading or port of discharge[;]" *id.* at 385.

This agreed description of the circumstances in which the USDA requires exporters to obtain new certificates is a plausible one. It adopts a principle – materiality – that has been widely employed in various circumstances, including False Claims Act actions. *See, e.g., United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.,* 400 F.3d 428, 442 (6th Cir.) (holding that "false statements or conduct must be material to the false or fraudulent claim to hold a person civilly liable under the [False Claims Act]"), *cert. denied,* 126 S. Ct. 727 (2005); *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 784 (4th Cir. 1999) (stating that "[l]iability under each of the provisions of the False Claims Act is subject to the further, judicially-imposed, requirement that the false statement or claim be material" and that "[m]ateriality depends on whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action") (internal quotation marks omitted). Accordingly, although the parties may dispute whether a particular change in a particular certificate is significant enough to require issuance of an "in lieu of" or replacement certificate, we conclude from this record that there is a certain

class of changes that do require such certificates. *See Excel Corp. v. United States Dep't. of Agric.*, 397 F.3d 1285, 1296 (10th Cir. 2005) (stating that "we must defer to both formal and informal agency interpretations of an ambiguous regulation unless those interpretations are plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted). Therefore, in examining the parties' other arguments, we consider whether Conagra's alleged failure to obtain new certificates in those instances (where there were "major" or "significant" changes) constituted the avoiding of an "obligation" under § 3729(a)(7).

2. Obligations Under § 3729(a)(7)

Mr. Bahrani next challenges the district court's conclusion that, even if the USDA regulations require exporters to pay for "in lieu of" and replacement certificates (a proposition we accept to the extent that the changes are "major" or "significant"), that "obligation" is outside the scope of § 3729(a)(7). The government has filed an amicus brief in which it agrees with Mr. Bahrani's position.

According to the government, two kinds of obligations may be the subject of a reverse false claims action under § 3729(a)(7):

(1) "[t]here may be a fixed obligation, spelled out by a judgment, contract, statute, or regulation, that imposes a duty on the person to pay money or transmit property to the government. This fixed obligation may be liquidated as with a judgment, or it may be unliquidated but easily determinable[;]" Amicus Br. at 10; and

(2) there are other obligations that are "not yet 'fixed' in all particulars"; these "obligations" may be present "by virtue of the relationship between the government and the person who owes the government money or property." *Id.* For example, such obligations may exist "[w]hen the person and the government have a contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship." *Id.*

The government maintains that, accepting Mr. Bahrani's contention that the USDA regulations require exporters to pay for new certificates when the original certificates contain errors or omissions, the fees for the new certificates fall within this second category of actionable § 3729(a)(7) obligations.

In response, Conagra notes that, at the time that an exporter determines that a certificate contains errors or omissions, no payment is due the USDA. Instead, payment is due only after (1) the exporter notifies the USDA of the errors and omissions that need to be changed; (2) the USDA determines that "an in lieu of" or replacement certificate is required; and (3) the USDA charges the established fee. According to Conagra, these additional stages in the process indicate that, when its employees made changes to the original export certificates, there was no "obligation" to pay the fee for "in lieu of" or replacement certificates.

Conagra also advances several policy arguments challenging Mr. Bahrani's and the government's reading of the statute. It contends that the purpose of the fees at issue is to reimburse the government for the cost of providing certification. Yet, by allegedly failing to request "in lieu of" and replacement certificates, the company did not

cause the government to provide any services for which it should have been reimbursed. Because the False Claims Act was enacted to protect the government from financial losses, allowing Mr. Bahrani to pursue his claims would be inconsistent with the purpose of the statute. Moreover, Conagra concludes, to allow Mr. Bahrani to invoke the statute here would lead to an unwarranted expansion of reverse false claim actions. Absent proof of loss to the government, anyone challenging a failure to comply with a regulatory scheme could file suit.

We begin with the timing of the payment for export certificates. Like the government, we think that it is significant that § 3729(a)(7) refers to "an obligation" and not "a fixed obligation." We agree that there are instances in which a party is required to pay money to the government, but, at the time the obligation arises, the sum has not been precisely determined.

The obligation addressed by the Eleventh Circuit in *Pemco Aeroplex,* 195 F.3d at 1237-38, provides an illustration. There, the aircraft maintenance company and the government had agreed that the government could elect to sell excess property to the company. However, at the time that the company made the allegedly false statements about the property's values, the specific amount of the company's obligation had not yet been determined. Nevertheless, "[t]hat the maintenance company offered to purchase the property and that a specific purchase price had not yet been agreed upon at the time [the company] submitted the inventory form are not the touchstone. . . . [S]ubmitting the inventory form was just part of fulfilling [an] ongoing contractual obligation." *Id.; contra Q Int'l,* 131 F.3d at 774 (stating that "[a] debt, and thus an obligation

under the meaning of the False Claims Act, must be for a fixed sum that is immediately due").

Additionally, to require a fixed monetary obligation as a prerequisite for a reverse false claims action would be inconsistent with the broad remedial purpose of the False Claims Act. *See Neifert-White,* 390 U.S. 228, 233 (1968) (noting that "this remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money"). Moreover, other provisions of the statute have been construed to allow actions to proceed even though the specific amount of the claim was not yet determined at the time the false statement was made. *See, e.g., Shaw v. AAA Eng'g & Drafting, Inc.,* 213 F.3d 519, 530 (10th Cir. 2000) (affirming a judgment for the plaintiff in a False Claim Act action under 31 U.S.C. § 3729(a)(1)-(2) that was based upon the submission of fraudulent work orders and concluding that "[s]imply because the production quantities recorded on the work orders did not determine the exact amount of the settlement does not eradicate a connection between the work orders and the [amount received by the defendant under the government contract]"). We therefore conclude that the fact that the fees for "in lieu of" and replacement certificates are not paid when the exporter determines that the initial certificate contains errors or omissions does not foreclose recovery under § 3729(a)(7).

Although a § 3729(a)(7) "obligation" need not be for a precise amount in order to be actionable, we do agree with the district court and Conagra that the obligation must arise from a source independent of "the allegedly fraudulent acts taken to avoid it." *Bahrani,* 338 F. Supp. 2d at 1207. That conclusion comports with the Sixth and Eighth Circuit decisions in *American Textile Manufacturers*

and *Q International*, both of which concluded on the facts before them that no obligation existed independently of the alleged false statements themselves. *See Am. Textile Mfrs.*, 190 F.3d at 738-41 (concluding that, under the statutes at issue, the defendant's obligations arose only after the defendant made false statements and "only because the government ha[d] prohibited an act"); *Q Int'l*, 131 F.3d at 773 (holding that, when the defendant engaged in the challenged practice of "ABA remail," it had no "obligation" to pay full domestic postage, even though the practice might have violated other statutes).

However, unlike the district court, we view the alleged obligations at issue in *American Textile Manufacturers* and *Q International* as distinguishable from the obligation to pay fees for "in lieu of" and replacement certificates when major or significant changes are necessary. Here, it is not Conagra employees' making of corrections on the original export certificates that creates the obligation to pay the fee. Instead, that obligation arises from an independent source – from the determination that the original certificate contains a major or significant error or omission and that an "in lieu of" or replacement certificate and payment of the accompanying fee are necessary. It is the discovery that these changes are necessary that creates the obligation. In our view, the circumstances are analogous to a motorist who attempts to avoid an annual fee by unlawfully altering the expiration date on a license plate. In that instance, it is not the altering of the plate that generates the fee but rather an independent event – the end of the yearly period.

As to Conagra's contention that the alleged false statements have not resulted in a loss to the government, we note that "there is no requirement in the text [of

§ 3729(a)(7)] that the Government have an ongoing interest in the funds or that the Government itself suffer a loss." *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039, 1047 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2957 (2005). Indeed, the legislative history of the reverse false claims provision indicates that the kind of false certification alleged by Mr. Bahrani falls within its scope:

> The cost of fraud cannot always be measured in dollars and cents, however. GAO pointed out in its 1981 report that fraud erodes public confidence in government's ability to efficiently and effectively manage its programs. Even in cases where there is no dollar loss, for example where *a defense contractor certifies an untested part for quality* yet there are no apparent defects – the integrity of quality requirements in procurement programs is seriously undermined.

S. Rep. No. 99-345, reprinted in 1986 U.S.C.C.A.N. 5266, 5268 (emphasis added); *see also United States v. Hughes*, 585 F.2d 284, 286 n.1 (7th Cir. 1978) ("A false claim is actionable under the Act even though the United States has suffered no measurable damages from the claim."); *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964) ("Proof of damage to the Government resulting from a false claim is not part of the Government's case under the Act").

3. USDA Discretion

We also disagree with the district court that the discretion afforded USDA officials to determine whether to issue new certificates and charge the accompanying fees renders the obligation contingent and thus outside the scope of § 3729(a)(7). The district court based its narrow

reading of the statute on *American Textile Manufacturers.* and *Q International*. Both cases concluded that a potential penalty that could only be assessed after a government official exercised discretion was not an actionable § 3729(a)(7) obligation. In the Sixth Circuit's view, if such potential penalties constituted "obligations," "reverse false claims liability would attach to any person making any false statement to conceal avoid, or decrease his potential criminal liability under a law that lists among a range of penalties the imposition of a fine." *Am. Textile Mfrs.*, 190 F.3d at 739. In addition to greatly expanding the scope of the False Claims Act, that interpretation would require courts to speculate as to whether in a given case, a government official would pursue an action to recover a penalty and whether such penalties would actually be assessed. *Id.* at 740; *see also Q Int'l*, 131 F.3d at 774 (reasoning that "[a] potential penalty, on its own, does not create a common law debt").

Here, the fees for "in lieu of" and replacement certificates are best characterized as user fees; they are not penalties. The fees must be paid in limited circumstances, and they are thus distinguishable from the general obligation to comply with statutes and regulations outside the scope of § 3729(a)(7). *See Am. Textile Mfrs.*, 190 F.3d at 737-38 (stating that "Congress may well have intended reverse false claims liability to extend to obligations created by statute or regulation, at least where the statute or regulation imposes an obligation essentially contractual in nature" but not deciding that question). Thus, we are not convinced that an undue expansion of liability under the reverse false claims provision will follow by characterizing as an "obligation" the payment of the fees for new

certificates when major or significant changes are required.

We acknowledge that there is some discretion in play here. Although the parties do not discuss the process in much detail, Conagra has submitted an affidavit from a former USDA official stating that if a certificate "needs to be changed in some way after it is issued, the inspector in charge has discretion under 9 C.F.R. § 322.2(c) to allow the exporter to make the change directly or, instead, to require the issuance of a new or replacement certificate." *See* Aple's Supp.App. vol. I, at 277 (affidavit of Dr. Robert Fetzner). Moreover, the official continues, "[i]f a new or replacement certificate is required, the inspector has discretion to charge a fee or not[,]" and "a fee would be charged only if the inspector determined it was necessary." *Id.* at 277-78.

Nevertheless, we are not convinced that this alleged discretion takes the obligation to pay the fees outside the scope of § 3729(a)(7). Some discretion inheres in a wide variety of government decisions. For example, government officials may have discretion as to whether to insist on a party's performance under a contract or whether to file a breach of contract action if a party does not perform. However, a contractual obligation falls within the scope of § 3729(a)(7). *See Pemco Aeroplex,* 195 F.3d at 1237 (concluding that a "specific, ongoing obligation during the life of the contract" was covered by § 3729(a)(7)); *Am. Textile Mfrs.,* 190 F.3d at 741 ("§ 3729(a)'s definition of 'obligation' certainly includes those arising from . . . breaches of government contracts").

Here, evidence submitted by both Mr. Bahrani and Conagra indicates that when export certificates required

"significant" or "major" changes, the USDA required exporters to obtain "in lieu of" or replacement certificates. It was at that point – when the changes became necessary – that the obligation arose. The fact that USDA officials may have some subsequent discretion whether to actually charge the authorized fee does not mean that the "obligation" is a contingent one outside the scope of § 3729(a)(7). We therefore agree with the government that "the need for some further governmental action or some further process to liquidate an obligation does not preclude a reverse false claims action." Amicus Br. at 12 n.2; *see also id.* at 14 (stating that "if, as alleged by [Mr. Bahrani], the regulations did not permit such alterations [of export certificates], but required the issuance of a new certificate and payment of an additional fee, then any . . . acts of USDA officials in either waiving the fee or refusing to enforce it could not [render the fee] . . . discretionary or contingent.").

That conclusion is supported by the terms of the statute, which address "conceal[ing], reduc[ing], or avoid[ing] an obligation[,]" but do not specify the result of those efforts. Thus, in determining whether a false statement is material under § 3729(a)(7), the inquiry "focuses on *the potential effect* of the false statement when it is made, not on the actual effect of the false statement when it is discovered." *A+ Homecare,* 400 F.3d at 445 (emphasis added) (internal quotation marks omitted). The fact that a government official may subsequently waive an established fee does not negate the "potential effect" of a false record or statement.

4. Failure to Return Original Certificates

Mr. Bahrani also maintains that the district court erred by not addressing his allegation that Conagra employees violated § 3729(a)(7) by failing to return the original certificates to the USDA after they discovered that changes were necessary. He cites a regulation that states that original certificates superseded by "in lieu of" certificates, "shall, if available, be surrendered to the inspector in charge." 9 C.F.R. § 322.2(c). By making changes on the original certificates instead of returning them, he continues, Conagra employees avoided an obligation to "transmit . . . property to the Government." 31 U.S.C. § 3729(a)(7).

We are not persuaded that the district court erred in failing to consider this theory. First, we agree with Conagra that Mr. Bahrani did not adequately advance this allegation in the district court proceedings. When the district court asked for supplemental briefing from the parties on the question of the legal basis of Conagra's "obligation" under § 3729(a)(7), Mr. Bahrani did not argue that this alleged duty to return original certificates under the USDA regulations constituted an independent claim. *See Rios v. Ziglar,* 398 F.3d 1201, 1209 (10th Cir. 2005) (holding that the "[f]ailure to raise an issue in the district court generally constitutes waiver"). Indeed, in explaining his view of Conagra's "obligation," Mr. Bahrani even made the following statement: "If something changes which renders the original USDA certificate useless to Conagra, they can do several things. They can throw it away; shred it; put it in a file never to see the light of day, or return it to the USDA." Aplt's App. vol. II, at 370. It was not until his motion for reconsideration that Mr. Bahrani sought to advance an independent claim based on Conagra's failure to return original certificates, *see id.,* at 422, and this

eleventh-hour presentation is insufficient to preserve that claim. *See Steele v. Young,* 11 F.3d 1518, 1520 n.1 (10th Cir. 1993).

In any event, had Mr. Bahrani timely raised such an argument in the district court, we are not convinced that these erroneous certificates constitute the kind of "property" within the scope of § 3729(a)(7). Mr. Bahrani cites no authority to that effect, and applying the statute in this fashion would stretch it far beyond its intended purpose.

B. Conagra's Alternative Arguments for Affirmance

1. Alleged Lack of Evidence Regarding False Statements to the Government

Conagra maintains that the district court's grant of summary judgment should be affirmed on the alternative ground that its employees did not make false statements to the government. In support of this contention, Conagra advances two arguments. First, it contends that because employees made corrections to the certificates, there were no false statements involved. Second, Conagra asserts, its employees lacked the intent to defraud necessary to satisfy the scienter requirements for a reverse false claims action. It maintains that "corrections to the original but inaccurate certificates were authorized." Aple's Br. at 44.

We are not persuaded by these arguments. As to the contention that Conagra's employees were correcting the export certificates, we note that it is *not* merely making the corrections to the certificates that may be actionable under the False Claims Act. Rather, it is the making of those corrections over the signature and certification of a

USDA official who has not actually seen or approved those changes.

Conagra's alleged reliance on USDA officials to approve corrections to original certificates similarly does not establish that its employees lacked the necessary intent to violate the statute. Section 3729(a)(7) requires proof that the defendant "knowingly" made, used, or caused to be made a false record or statement to avoid an obligation. To act "knowingly" means that "a person, with respect to information – (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b). "[N]o proof of specific intent to defraud is required." *Id.; see also United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 682 (10th Cir. 1998) (discussing the "knowingly" requirement under § 3729(a)(7)). As we have explained, it is only the making of "major" or "significant" changes without obtaining "in lieu of" or replacement certificates that establishes an actionable obligation under the statute. Evidence in the record indicates that in some instances Conagra employees made such changes without USDA approval and thus avoided the obligation to pay a fee for "an [sic] lieu of" or replacement certificate. *See* Aplt's App. vol. I, at 75 (testimony from Mr. Bahrani that a Conagra employee told him that she changed the grade of beef from "no grade" to "choice"). That evidence supports Mr. Bahrani's allegation that Conagra employees had the requisite intent. Moreover, the question of whether the employees acted "knowingly" concerns their knowledge at the time they made the major changes without applying for new certificates. That USDA officials may have approved minor changes or may have even waived the fees for some major

changes does not resolve the question of Conagra's employees' state of mind when the employees made the changes.

2. Lack of presentment to the United States

Conagra also argues that the district court's grant of summary judgment should be affirmed on another alternative ground: that even accepting Mr. Bahrani's allegations as true, Conagra employees never made any false representations to the United States government (because the export certificates at issue were presented only to foreign governments).

In support of this argument, Conagra invokes a statement in *Kennard v. Comstock Resources,* 363 F.3d 1039, 1048 (10th Cir. 2004): that § 3729(a)(7) "squarely encompasses the fraud on the government that occurs when a person or entity makes false statements *to the United States* to avoid [an obligation]." (emphasis added). Conagra also cites a district court case, *Wilkins v. Ohio,* 885 F. Supp. 1055 (E. D. Ohio 1995), in which the court dismissed a reverse false claim action on the grounds that the plaintiff had not alleged that false information was presented to the government. The court there relied on legislative history. *See id.* at 1064 ("The Senate Report supports the conclusion that in order to have a 'reverse false claim,' the government has to be made aware of the false statement, misrepresentation or misleading omission in some fashion, i.e., there has to be a 'claim.'"). Conagra cites two unpublished cases that make similar statements about presentment to the government. *See* Aple's Br. at 46 (citing *Stevens v. McGinnis,* No. C-193-442, U.S. Dist. Lexis 22109 (S.D. Ohio Aug. 27, 1996) and *Atkinson v. Pa.*

Shipbuilding Co., No. 94-7316, 2000 U.S. Dist. Lexis 12081, at *80 (E. D. Pa. Aug. 24, 2000)).

In our view, these cases do not provide much support for Conagra's argument. This circuit's statement in *Kennard* – that § 3729(a)(7) "squarely encompasses the fraud on the government that occurs when a person or entity makes false statements *to the United States* to avoid [an obligation]," 363 F.3d at 1048 (emphasis added) – does not restrict the scope of the statute to only those instances in which statements are so made. Moreover, the district court cases invoked by Conagra are not precedential and do not concern the kind of regulatory scheme at issue here, one that involves the provision of government services in exchange for payment of a fee.

Additionally, as Mr. Bahrani argues in his reply brief, nothing in the language of § 3729(a)(7) indicates that presentment to the government is required. Other sections of the false claim statute *do* require presentment. *See, e.g.*, § 3729(a)(1) (establishing liability for one who "knowingly *presents, or causes to be presented,* to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval") (emphasis added); *see also United States. ex rel. Koch v. Koch Indus.*, 57 F. Supp. 2d 1122, 1144 (N.D. Okla. 1999) ("The bad act under (a)(1) is the presenting of a false claim. The bad act under (a)(7) is the making or using of a false statement or record. *There is no 'presentment' language in § 3729(a)(7).*") (emphasis added).

We agree that § 3729(a)(7) does not require presentment to the United States government, and Conagra is

thus not entitled to summary judgment on that ground either.

3. Original source requirement as to "meat-related" claims

As a final alternative ground for affirming the district court's grant of summary judgment, Conagra contends that Mr. Bahrani is not an "original source." Conagra limits its argument to the part of the case that concerns certificates for meat products.

Conagra's argument is based upon 31 U.S.C. § 3730(e)(4)(A) & (B), which provide:

> (4)(A) No court shall have jurisdiction over an action under this section based upon *the public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, *unless* the action is brought by the Attorney General or *the person bringing the action is an original source of the information.*
>
> *(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.*

31 U.S.C. § 3730(e)(4)(A) & (B) (emphasis added).

At the summary judgment stage, application of this statutory language involves a four-part inquiry: (1) whether

the alleged "public disclosure" contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made "public" within the meaning of the False Claims Act; (3) whether the relator's complaint is "based upon" this public disclosure; and, if so, (4) whether the relator qualifies as an "original source." *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1544 (10th Cir. 1996). The burden is on Mr. Bahrani to show that he is an original source. *United States ex rel Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 800-02 (10th Cir. 2002). However, a court should address the first three public disclosure issues first. *Id.* Consideration of the original source requirement is necessary only if the court answers the first three questions affirmatively. *MK-Ferguson*, 99 F.3d at 1544.

Here, Conagra contends, the first two elements of the original source defense are clearly established. Mr. Bahrani reported his allegations to the government in August 1999. However, prior to that time, these allegations had been publicly advanced in litigation, a government investigation, and media reports.

In particular, in April 1999, in the "Kim litigation" in the Central District of California, the defendants asserted counterclaims against Conagra alleging improper alteration of meat export certificates. According to Conagra, Mr. Bahrani cooperated with the Kim defendants and their counsel, even to the point of appearing voluntarily as a witness on their behalf. These allegations were disclosed in a government investigation. The defendants in the Kim litigation provided copies of allegedly altered export certificates to the USDA, which caused the government to launch an extensive investigation into Conagra's practices.

Finally, the allegations made in the Kim litigation were widely published in the media.

As to the third element, whether the relator's complaint is "based upon" this public disclosure, Conagra notes that "[e]ven qui tam actions only partially based upon publically [sic] disclosed allegations or transactions may be barred." *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051 (10th Cir. 2004), *cert denied*, 125 S. Ct. 2964 (2005). "The test is whether substantial identity exists between the publically [sic] disclosed allegations or transactions and the qui tam complaint." *Id.* (internal quotation marks omitted). Here, Conagra contends, "Bahrani's meat-related claims closely mirror the allegations made in the Kim [l]itigation which spawned the Government's investigation and numerous media reports." Aple's Br. at 51. According to Conagra, the identical issues are addressed in this lawsuit, "namely whether the changes made to export certificates were approved by the USDA or whether Conagra was required to obtain replacement certificates." *Id.*

Because these first three elements are satisfied, Conagra continues, Mr. Bahrani must establish that he was an "original source." That means that (1) he must have had direct and independent knowledge of the information on which the allegations are based and (2) he must have voluntarily provided such information to the government prior to filing suit. *United States ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160-61 (10th Cir. 1999).

Here, Conagra maintains, Mr. Bahrani did not have direct and independent knowledge of his meat-related claims because he worked in the Hides Division at Conagra,

not the Meat Products Division. Moreover, Conagra argues, Mr. Bahrani derived his knowledge from information made public from the Kim litigation in California. For example, Mr. Bahrani's Second Amended Complaint alleges that the alterations to meat export certificates began in 1991. However, he did not begin working for Conagra until 1996, and has submitted no evidence showing that he has any personal knowledge of relevant events preexisting his employment. Conagra contends that Mr. Bahrani "apparently used 1991 because it was [on] that date that the Kim defendants claimed the alleged improper practices began." Aple's Br. at 53. Also, Conagra notes, during the course of this litigation, Mr. Bahrani disclosed many documents that he had obtained from the Kim litigation.

Finally, Conagra asserts, Mr. Bahrani's knowledge of meat-related export certificates was "second-hand." *Id.* at 54. Mr. Bahrani did not state that he personally altered meat certificates, nor, according to Conagra, did he know the procedures related to meat certificates, or the significance of any alterations that he did observe.

Upon review of the record, we are not persuaded by this alternative argument for summary judgment. Assuming, without deciding, that Conagra has established the first three elements of the inquiry, we conclude that Mr. Bahrani has submitted sufficient evidence to support his contention that he is an original source. In particular, he has offered an affidavit stating that he personally observed the alteration of export certificates while he worked for Conagra and that he heard a supervisor authorizing such changes. When viewed in the light most favorable to Mr. Bahrani – the party opposing summary judgment – these statements support his contention that he had

"direct and independent knowledge of the information on which [his] allegations are based" and that this knowledge was "gained by [his] own efforts and not acquired from the labors of others." *Grynberg*, 389 F.3d at 1052 (internal quotation marks omitted). Additionally, Mr. Bahrani has also offered evidence indicating that he voluntarily disclosed these observations to USDA investigators in August or September 1999, before he filed this action. *See* Aple's Supp.App. vol. I, at 237.

Accordingly, to the extent that Mr. Bahrani's allegations are based upon personal observations that he disclosed to investigators, Conagra is not entitled to summary judgment on this issue.

III. CONCLUSION

As applied to these circumstances, we read § 3729(a)(7) more narrowly than Mr. Bahrani but more broadly than Conagra. Like the district court, we are not persuaded that every change to a signed export certificate made by a Conagra employee creates an "obligation" under the statute. However, to the extent that Conagra employees made "major" or "significant" changes without applying for "in lieu of" or replacement certificates, they avoided an obligation under § 3729(a)(7).

We emphasize that the appropriate inquiry is certificate-specific. Because of their interpretations of the regulatory scheme, both Mr. Bahrani and Conagra have advanced arguments that pertain to all changes to original export certificates, no matter how extensive. In our view, however, whether a given change to an original certificate triggers a § 3729(a)(7) obligation depends upon the nature of the change – whether it is "major" or "significant" and

thus requires a new certificate. Although many of the unauthorized changes alleged by Mr. Bahrani appear to be minor, there is evidence that at least some of them fell within the "major" or "significant" class. Further development of the record is required to determine the extent to which Conagra employees made "major" or "significant" changes without obtaining "in lieu of" or replacement certificates and paying the accompanying fee.

Because Conagra's alternative arguments in support of the district court's grant of summary judgment lack merit, we therefore VACATE the district court's grant of summary judgment and REMAND for further proceedings consistent with this opinion.

338 F.Supp.2d 1202

United States District Court,
D. Colorado.
UNITED STATES of America, ex rel, Ali BAHRANI,
Plaintiffs,
v.
CONAGRA, INC.; Conagra Hide Division; Conagra Beef Companies, and Monfort, Inc.,
No. CIV.A.00-K-1077.

Sept. 30, 2004.

George Harold Parker, Jr., Dedolph & Parker, LLP, Fort Collins, CO, for Plaintiff.

Darrell G. Waas, David Patrick Hutchinson, Patricia Claire Campbell, Daniel Kennedy Calisher, Otten, Johnson, Robinson, Neff & Ragonetti, P.C., Denver, CO, John J. Schirger, Mark F. Enenbach, Thomas James Kelley, Edward George Warin, Mcgrath, North, Mullin & Kratz, Omaha, NE, for Defendants.

MEMORANDUM OPINION AND ORDER

KANE, Senior District Judge.

This reverse false claim *qui tam* action is before me on various motions and cross-motions for partial summary judgment. The motions, following in the wake of my Memorandum Decision denying Defendants' Motion to Dismiss,[1] are largely requests for discrete legal determinations, which I decline to address piecemeal. Finding upon review of these motions that the overarching question in

[1] That decision, *U.S. ex rel. Bahrani v. Conagra, Inc.*, is published at 183 F.Supp.2d 1272 (D.Colo.2002).

this case remains the viability of Plaintiff's legal theory of relief under the reverse false claims provision of the False Claim Act, I issued an Order posing a series of questions for counsel and set the summary judgment motions for oral argument. At the conclusion of oral argument, I granted both sides leave to file supplemental materials and legal briefs.

I have now reviewed all of the briefs and materials submitted by the parties on the issues raised on summary judgment. I have also considered the oral presentations of both sides. After careful consideration of these and an exhaustive review of the False Claims Act and various statutes governing the certification of agricultural products for export, the regulations promulgated thereunder, and the legal authorities and case law interpreting these statutory and regulatory provisions, I conclude Plaintiff has failed to adduce sufficient evidence to support a cognizable reverse false claim theory of relief against Defendants under 31 U.S.C. § 3729(a)(7). Specifically, Plaintiff has failed to come forward with facts to support its contention that Defendants engaged in unlawful action for the purpose of avoiding or decreasing an actual or existing "obligation to pay" moneys otherwise due and owing to the government. Under these circumstances, and even assuming Defendants' alleged activities in altering or changing agricultural export certificates violated rules or regulations prohibiting such alteration or change, there can be no liability under the Act. Accordingly, summary judgment shall enter in favor of Defendants and against Plaintiff on all of Plaintiff's claims.

Discussion.

1. *Background.*

Relator Ali Bahrani bases his cause of action under Section (a)(7) of the False Claims Act, 31 U.S.C. § 3729(a)(7), on the allegation that Conagra documentation department employees near Greeley, Colorado, routinely forged, falsified or altered USDA Export Certificates in order to avoid obtaining replacement, or "in lieu of," certificates for which Conagra should have paid a $21-$24 user fee. By engaging in such actions up to 200 times per week over a period of ten years, Bahrani estimates Conagra, through the actions of these employees, defrauded the government out of up to $1 billion in user fees it would have received had Conagra secured the requisite replacement certificates.

While a typical False Claims Act action alleges an excessive payment from the United States *to* the defendant, the statute was amended in 1986 to support a "reverse false claim" action alleging an insufficient payment from the defendant *to* the United States. Under a "reverse false claim" theory, any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government" is liable under 31 U.S.C. § 3729(a)(7) for treble damages and per-claim penalties that may exceed by many times the dollar amount out of which the government was allegedly defrauded. *See generally* John T. Boese, *Civil False Claims and Qui Tam Actions,* vol. 1, "Historical Overview" (2d ed. Aspen Pub.1993 & 2004-2 Supp.) (discussing Act's evolution from Civil War area through its 1986 amendment).

In my Memorandum Decision denying Defendants' Motion to Dismiss in this case, I concluded Bahrani's allegations that Conagra falsified export certificates in order to avoid paying the user fee necessary to obtain mandatory "in lieu of" certificates "f[ell] squarely within this provision." *Bahrani,* 183 F.Supp.2d at 1278. In doing so, I accepted as true not only the factual averments that Conagra altered or forged export certificates after they were certified and did so with the requisite intent to defraud the government out of fees it would have charged to issue replacements, but also the underlying legal premise that Conagra, but for the fraud, would have been "obligated" both to obtain the replacement certificates *and* "to pay" the associated fees but for its fraud. It is the existence of this "obligation to pay," and the remedy available for violating it, that is proving problematic on summary judgment.

2. *Legal Standard.*

Congress's intent in enacting the so-called reverse false claims provision of the False Claims Act was to "give[] the United States a means to recover from someone who makes a material representation to avoid paying some obligation owed to the government." *United States v. Q Int'l Courier,* 131 F.3d 770, 772 (8th Cir.1997) (citing S.Rep. No. 99-345, at 15, 18, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280, 5283); *Am. Textile Mfrs. Inst., Inc. (ATMI) v. The Limited, Inc.,* 20 ITRD 2380, 1997 WL 33421319 (S.D.Ohio 1997) (providing extensive analysis of legislative history underlying § 3729(a)(7) and granting motion to dismiss), *aff'd,* 190 F.3d 729, 736 (6th Cir.1999) (affirming dismissal, providing additional discussion of legislative history and collecting cases); *cf. United States*

ex rel. Aakhus v. Dyncorp, Inc., 136 F.3d 676, 680-81 (10th Cir.1998) (outlining mechanisms of recovery under FCA, including "reverse false claims," but without reference to congressional purpose or intent). *See generally,* Boese, *supra,* "Historical Overview" & § 2.01[G][1].

The Tenth Circuit has yet to address the contours of this provision critically, but courts that have are in agreement that the focus of the inquiry is on the nature of the "obligation" on which a reverse false claim may be based. The "obligation" to pay or transmit money may arise in contract, or at law in the form of a legal judgment or "debt," or may be created by statute or regulation. *See Q Int'l,* 131 F.3d at 773 (citing *United States ex rel. S. Prawer & Co. v. Verrill & Dana,* 946 F.Supp. 87, 89, 93-95 (D.Me.1996)); *see generally* Boese, *supra,* § 2.01[G][1] *and* "Construction and Application of 'Reverse False Claim Provision' of False Claims Act, 31 U.S.C.A. § 3729(a)" § 4, 162 A.L.R. Fed. 147, 2000 WL 713697 (2004). Whatever its source, however, the "obligation" refers not only to a real and legally enforceable duty to pay or transmit money or property to the government, but one that pre-exists the acts in which the defendant engages to avoid it. *ATMI,* 190 F.3d at 734-35 (§ 3729(a)(7) "prohibits the use of a false statement to 'conceal, avoid, or decrease an obligation,' and does not use the phrasing 'that create an obligation' "). *Accord Q Int'l,* 131 F.3d at 773; *Prawer,* 946 F.Supp. at 93-95. A contingent or potential liability to the government is not a cognizable financial "obligation" to the government, *Q Int'l* at 773, nor is an obligation "that will arise only after the exercise of discretion by government actors." *ATMI,* 190 F.3d at 738. Because the "obligation" to pay user fees in the instant case, under even the most favorable view of Bahrani's theory of relief, is contingent not

only on the nature of the "obligation" to obtain and pay for replacement certificates in the first instance when information on existing certificates is changed, but also on the government's discretion to consent to changes being made directly on the certificate without the need for a replacement, Bahrani's allegations state no actionable reverse false claim under the FCA.

3. *The "Obligation" to Obtain, and Pay for, Replacement Certificates under Department of Agriculture Regulations.*

The specific source of the "obligation" to obtain replacement or in-lieu of certificates – and to pay the government for them – has been elusive from the outset of this case. In his Complaint, Bahrani simply asserted that "[i]n a situation where the information on the export certificate changed because the identity of the buyer and destination changed, *the law* requires issuance of a new export certificate with the correct information." Compl. ¶ 35 (emphasis added). In his Response to Conagra's Motion to Dismiss, Bahrani identified "C.F.R. 322.2" (which I read as a reference to 9 C.F.R. § 322.2) as the source for "the law" governing Conagra's "duty to pay a sum certain before an export document can be altered or modified from the original" and for the amount of that sum, "$21.50 per false export certificate." *See* Response at p. 20. Section 322.2, however, describes procedures for the issuance, upon application, of export certificates as part of the Department of Agriculture's food safety and inspection *voluntary* certification procedures for meat products, and merely authorizes inspectors to issue official export certificates for shipments of inspected and passed product to foreign countries upon application of the exporter, *see* 9

C.F.R. § 322.2(a), and, "for sufficient reasons," otherwise unidentified, to issue "new certificates in lieu of the original certificates." *Id.* § 322.2(c). Section 322.2 is silent as to the circumstances under which the securing of an "in lieu of" certificate is necessary, and says nothing about the securing of such a certificate, or paying for it, being mandatory. Applying an extremely deferential standard to Bahrani's Complaint under Rule 12(b)(6), however, I assumed the obligation rested somewhere else in the regulatory scheme and denied Conagra's Motion to Dismiss.

The question of the source of Conagra's purported "obligation to pay . . . money . . . to the government" for replacement or "in lieu of" certificates arose tangentially again in Conagra's Motion for Partial Summary Judgment on Hide Exports. In response to the Motion, which was a challenge to the falseness or fraudulent nature of Conagra's alleged alterations under the Act rather than a challenge to the existence of the legal "obligation to pay" itself, Bahrani argued the alteration of hide export certificates – even if only to correct errors that existed in the original certificate – impacts the integrity of the USDA certification process and violates USDA policy "strictly prohibit[ing] any alterations, changes or corrections to their export certificates without the prior knowledge and approval of the certifying inspection official." Pl.'s Resp. to Mot. Partial Summ. J. on Hide Exports at pp. 2-3. As support for this policy or "obligation," Bahrani attached the affidavit of Dr. Mark T. Mina, a 30-year USDA employee and retired USDA Deputy Administrator for Field Operations.

In his affidavit, Dr. Mina, without reference to any federal statute or Department of Agriculture regulation,

testified that it is a "long-standing policy" of the USDA to maintain the integrity of the export certification process and that "any change, correction, or alteration made to a USDA export certificate after it has been signed by a USDA official is serious and improper." Mina Affid. (attached as Ex. A to Relator's Response to Mot. Partial Summ. J. on Hide Exports) at ¶¶ 4-5. "When Conagra alters, changes or corrects USDA export certificates for cattle hides and animal meat products (including beef, pork and poultry)," Dr. Mina continued, "then it avoids paying set and established monetary fees to the USDA to obtain the necessary and correct documentation required by them to export their products." *Id.* ¶ 7. Dr. Mina does not identify the source for the set and established monetary fees avoided by such alteration or change, but it is an apparent reference to user fees for endorsing export certificates set forth in 9 C.F.R. § 130.20. I note that user fees under 9 C.F.R. part 130 are for the purpose of reimbursing the Department of Agriculture for costs incurred in connection with the furnishing of services, including the endorsing of certificates, *see* 9 C.F.R. § 156.7, and may be in the nature of a flat fee as in the instance of cow hides under APHIS regulations or based on a 1/4 hour minimum of a veterinarian's hourly rate under FSIS regulations for meat, pork and poultry.

Leading up to oral argument on the various Motions for Summary Judgment, then, the "obligation" to obtain replacement certificates and "to pay" the government a user fee for doing so appeared to be based, at most, on an informal agency practice or policy interpretation of 9 C.F.R. § 322.2, and not any duty or obligation codified anywhere in the applicable regulations. Accordingly, I asked the parties to identify, with specificity, (1) "the

source of the obligations to obtain a new certificate and to pay an additional fee"; (2) the "law" referenced in ¶ 35 of Plaintiff's Complaint; (3) whether the government could enforce this "law" and, if so, how; and (4) if the "obligation" referred to a policy interpretation or informal agency practice, what legal basis is there for enforcing that policy or practice through a whistleblower action under the FCA? *See* Order, dated 7/22/04. The answers to these questions received at oral argument, and set forth in the supplemental filings I allowed the parties to file in its wake, persuade me Relator's theory of relief in this case is not actionable under the reverse false claims provision of 31 U.S.C. § 3729(a)(7) under *Q Int'l, ATMI* and related authority.

In the instant case, Relator's reverse false claim is premised on an averred statutory or regulatory obligation that is neither apparent in the regulatory scheme nor enforceable by the government in an action at law. None of the statutory or regulatory provisions cited in Bahrani's argument or in his supplemental filings – not the 1990 Farm Bill or the APHIS and FSIS user fee regulations promulgated thereunder, not FSIS Directive 9000.1 setting forth the grounds under which a replacement certificate may be issued – establishes that an exporter is *required* to obtain a replacement certificate every time a change to an existing certificate is made. To the contrary, Bahrani's own witness, Dr. Mina, specifically states in his affidavit that the proper procedure for making changes to an existing export certificate under USDA regulations and policy may include simply "*inform[ing]* the certifying official (inspector or veterinarian) of the changes that need to be made *and the certifying official will initial the change or, if the changes are major, he will issue a replacement or in lieu of certificate at the request of the exporter.*" Mina Affid. at ¶ 12

(emphasis added). Under all of the applicable legal authority, an "obligation" that is contingent, or that will arise only after the exercise of discretion by government actors, is not contemplated by the statute. *See ATMI,* 190 F.3d at 738 (citing cases).

Even assuming, for the sake of argument, that an "obligation to pay" APHIS or FSIS user fees arises every time an existing export certificate is altered, the act of altering the certificate (rather than requesting a replacement) is not an actionable reverse false claim because that "obligation" arises only as a result of that act and did not exist before. In *ATMI,* the Sixth Circuit affirmed the dismissal of a reverse false claim premised on the alleged submission of entry documents for imported textiles that included erroneous country of origin information. According to the *qui tam* plaintiff, the false information was included to avoid regulations prohibiting such importation and to avoid various duties, taxes and potential penalties that would otherwise apply. Affirming the district court's conclusion that such conduct does not give rise to an actionable reverse false claim under 31 U.S.C. § 3729(a)(7), the Sixth Circuit agreed that the scope of the reverse false claim provision was far narrower than to encompass acts of a defendant aimed at avoiding getting "caught" violating a statute or regulation or having to pay a fee or fine or tax or customs duty that could be imposed if he were playing straight. 190 F.3d at 738-39. The statutory or regulatory "obligation" had to be quantifiable and existing *before* the allegedly fraudulent acts taken to avoid it, lest an individual risk liability in a *qui tam* action any time he makes a false statement of compliance, or remains silent to avoid triggering an obligation to pay a fee or fine

or tax or other financial duty under an applicable federal regulation. *Id.*

As applied in the present case, Conagra's failure to inform the USDA of corrections[2] it made to existing export certificates – even if its purpose *was* to avoid an "obligation to pay" the user fees contemplated under the 1990 Farm Bill and the regulations promulgated thereunder – is precisely the kind of conduct deemed inactionable as a reverse false claim in *ATMI*. The definition of "obligation" under § 3729(a)(7) does not include those contingent obligations that arise only because the government has prohibited an act (changing an official USDA export certificate without notifying the USDA – there are other means of enforcing that obligation), or that may arise once the government exercises discretion (an inspector declining to initial a "major" change to an export certificate so the exporter must request, and pay for, a replacement).

Conclusion.

The acts of Conagra on which Bahrani premises this *qui tam* action on behalf of the United States for millions, perhaps billions, of dollars in penalties and treble damages, do not give rise to an actionable cause of action under 31 U.S.C. § 3729(a)(7). A defendant does not execute a reverse false claim by engaging in behavior that might or might not result in the creation of an obligation to pay or transmit money or property to the government. Accordingly, summary judgment shall enter in favor of

[2] There is no dispute in this case that the alterations or changes at issue were to correct errors in the original certificates, not to insert false information in the place of true.

Defendants and against the Relator on all of Relator's claims. This ruling terminates this action and any remaining pending motions are DENIED as MOOT.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, ex rel., ALI BAHRANI, Plaintiff-Appellant, v. CONAGRA, INC., et al., Defendants-Appellees. - - - - - - - - - - - - - - - - - - UNITED STATES OF AMERICA, Amicus Curiae.	No. 04-1407

ORDER

Filed May 10, 2007

Before **HENRY**, **McKAY**, and **TYMKOVICH**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: /s/ [Illegible]
Deputy Clerk

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9 C.F.R. § 130.20 User fees for endorsing export certificates.

(a) User fees for the endorsement of export health certificates that do not require the verification of tests or vaccinations are listed in the following table. The user fees apply to each export health certificate[5] endorsed for the following types of animals, birds, or animal products, regardless of the number of animals, birds, or animal products covered by the certificate. The person for whom the service is provided and the person requesting the service are jointly and severally liable for payment of these user fees in accordance with §§ 130.50 and 130.51.

Certificate categories	User fee Beginning Oct. 1, 2003.
Animal and nonanimal products	$32.00
Hatching eggs	30.00
Poultry, including slaughter poultry	30.00
Ruminants, except slaughter ruminants moving to Canada or Mexico	33.00
Slaughter animals (except poultry but including ruminants) moving to Canada or Mexico	35.00
Other endorsements or certifications	24.00

[5] An export health certificate may need to be endorsed for an animal being exported from the United States if the country to which the animal is being shipped requires one. APHIS endorses export health certificates as a service.

(b)(1) User fees for the endorsement of export health certificates that require the verification of tests or vaccinations are listed in the following table. The user fees apply to each export health certificate[6] endorsed for animals and birds depending on the number of animals or birds covered by the certificate and the number of tests or vaccinations required. However, there will be a maximum user fee of 12 times the hourly rate user fee listed in § 130.30(a) of this part for any single shipment. The person for whom the service is provided and the person requesting the service are jointly and severally liable for payment of these user fees in accordance with the provisions in §§ 130.50 and 130.51.

Number of tests or vaccinations and number of animals or birds on the certificate	User fee Beginning Oct. 1, 2003.
1-2 tests or vaccinations	
Nonslaughter horses to Canada:	
First animal	$38.00
Each additional animal	4.25
Other animals or birds:	
First animal	76.00
Each additional animal	4.25
3-6 tests or vaccinations	
First animal	94.00
Each additional animal	7.25

[6] An export health certificate may need to be endorsed for an animal being exported from the United States if the country to which the animal is being shipped requires one. APHIS endorses export health certificates as a service.

7 or more tests or vaccinations	
First animal	109.00
Each additional animal	8.50

(2) If an export certificate covers more than one animal, but the number of tests required for different animals are not the same, the user fee for the certificate is the fee which would be due if all the animals on the certificate required the same number of tests as the animal which requires the greatest number of tests.

(c) The user fees prescribed in this section will not apply to an export health certificate if the export health certificate is prepared for endorsement completely at the site of the inspection by an APHIS veterinarian in the course of performing inspection or supervision services for the animals listed on the certificate, and an APHIS user fee is payable under § 130.30 of this part for the inspection or supervision services performed by the veterinarian.

(Approved by the Office of Management and Budget under control number 0579- 0055)

[58 FR 38958, July 21, 1993; 58 FR 67655, 67656, Dec. 22, 1993; 61 FR 20436, May 7, 1996; 62 FR 61007, Nov. 14, 1997; 63 FR 18117, April 14, 1998; 63 FR 53796, Oct. 7, 1998; 64 FR 67700, Dec. 3, 1999; 65 FR 16124, March 27, 2000; 65 FR 52009, Aug. 28, 2000; 67 FR 48524, July 25, 2002; 68 FR 51886, Aug. 29, 2003]

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9 C.F.R. § 156.3 Kind of service; records.

Laws, regulations or other requirements of foreign countries and specifications of contracts for the purchase and sale of animal products, on occasion require vendors of

such products to furnish official certificates concerning the class, quality, quantity, or condition of such products to be imported into such countries or to be delivered under the contracts. The service under this part, shall consist of the inspection of the processing, handling, and storage of the products at any plant at which service is furnished and the certification, on the basis of such requirements of foreign countries or such contract specifications, of the class, quality, quantity, or condition of such of the products as are found to conform to such requirements or specifications as the case may be. Processing procedures will be actually supervised. The operator of the plant shall fully inform the inspector with respect to, and the inspector shall actually observe, the processing procedures, handling, and storage of the products intended for certification. The inspector shall keep such records of the temperatures reached, the duration of time the temperatures are maintained, and the pounds of pressure under which the products are cooked in the course of processing, and such other information, as are needed to justify the issuance of the certificates required.

[62 FR 19040, April 18, 1997]

SOURCE: 23 FR 10111, Dec. 23, 1958; 57 FR 771, Jan. 9, 1992; 57 FR 30899, July 13, 1992; 58 FR 67656, Dec. 22, 1993; 60 FR 64115, Dec. 14, 1995; 66 FR 21064, April 27, 2001, unless otherwise noted.

AUTHORITY: 7 U.S.C. 1622 and 1624; 21 U.S.C. 136a; 7 CFR 2.22, 2.80, and 371.4.

9 C.F.R. § 156.6 Certificates.

The inspector shall sign and issue certificates in forms approved by the Administrator for animal products, if the inspector finds that the requirements as stated in the certification have been met. The original and one copy of each certificate shall be furnished to the applicant, and one copy of each certificate shall be retained by the Department until disposal is authorized in accordance with law. Additional copies may be furnished the applicant at his request upon payment of the fees prescribed in § 156.7. Copies of the certificates may be furnished without charge to other properly interested Federal agencies or under compulsory process.

[57 FR 30899, July 13, 1992; 62 FR 19040, April 18, 1997]

SOURCE: 23 FR 10111, Dec. 23, 1958; 57 FR 771, Jan. 9, 1992; 57 FR 30899, July 13, 1992; 58 FR 67656, Dec. 22, 1993; 60 FR 64115, Dec. 14, 1995; 66 FR 21064, April 27, 2001, unless otherwise noted.

AUTHORITY: 7 U.S.C. 1622 and 1624; 21 U.S.C. 136a; 7 CFR 2.22, 2.80, and 371.4.

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9 C.F.R. § 156.7 Fees and charges, including user fees under 9 CFR part 130.

Fees and charges, and user fees under 9 CFR part 130, for service (including travel and other expenses incurred in connection with the furnishing of service) under this part shall be paid by the applicant in accordance with the terms of the cooperative agreement under which service is furnished and in accordance with this section which shall be deemed to be incorporated in such

agreement. If required by the Administrator, the fees and charges, and user fees under 9 CFR part 130, shall be paid in advance. Since the fees and charges, and user fees under 9 CFR part 130, are for the purpose of reimbursing the Department for all costs incurred in connection with the furnishing of service under this part, the appropriate fees and charges, and user fees under 9 CFR part 130, to cover any such costs shall be paid even though service is withheld pursuant to § 156.8.

[58 FR 67656, Dec. 22, 1993]

SOURCE: 23 FR 10111, Dec. 23, 1958; 57 FR 771, Jan. 9, 1992; 57 FR 30899, July 13, 1992; 58 FR 67656, Dec. 22, 1993; 60 FR 64115, Dec. 14, 1995; 66 FR 21064, April 27, 2001, unless otherwise noted.

AUTHORITY: 7 U.S.C. 1622 and 1624; 21 U.S.C. 136a; 7 CFR 2.22, 2.80, and 371.4.

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9 C.F.R. § 307.4 Schedule of operations.

(a) No operations requiring inspection shall be conducted except under the supervision of a Program employee. All slaughtering of animals and preparation of products shall be done with reasonable speed, considering the official establishment's facilities.

(b) A shift is a regularly scheduled operating period, exclusive of mealtime. One lunch period is the only official authorized interruption in the inspector's tour of duty once it begins. Lunch periods may be 30 minutes, 45 minutes, or in any case may not exceed one hour in duration. Once established, the lunch period must remain relatively constant as to time and duration. Lunch periods for

inspectors shall not, except as provided herein, occur prior to 4 hours after the beginning of scheduled operations nor later than 5 hours after operations begin. In plants where a company rest break of not less than 30 minutes is regularly observed, approximately midpoint between start of work and the lunch period, and the inspector is allowed this time to meet his personal needs, the lunch period may be scheduled as long as 5 1/2 hours after the beginning of scheduled operations.

(c) Official establishments, importers, and exporters shall be provided inspection service, without charge, up to 8 consecutive hours per shift during the basic workweek subject to the provisions of § 307.5: *Provided*, That any additional shifts meet requirements as determined by the Administrator or his designee. The basic workweek shall consist of 5 consecutive 8-hour days within the administrative workweek Sunday through Saturday, excluding the lunch period; except that, when possible, the Department shall schedule the basic workweek so as to consist of 5 consecutive 8-hour days Monday through Friday, excluding lunch period. The Department may depart from the basic workweek in those cases where maintaining such a schedule would seriously handicap the Department in carrying out its function. These provisions are applicable to all official establishments except in certain cases as provided in § 318.4(h) of this subchapter.

(d)(1) Each official establishment shall submit a work schedule to the area supervisor for approval. In consideration of whether the approval of an establishment work schedule shall be given, the area supervisor shall take into account the efficient and effective use of inspection personnel. The work schedule must specify daily clock

hours of operation and lunch periods for all departments of the establishment requiring inspection.

(2) Establishments shall maintain consistent work schedules. Any request by an establishment for a change in its work schedule involving an addition or elimination of shifts shall be submitted to the area supervisor at least 2 weeks in advance of the proposed change. Frequent requests for change shall not be approved: *Provided*, however, minor deviations from a daily operating schedule may be approved by the inspector in charge, if such request is received on the day preceding the day of change.

(3) Request for inspection service outside an approved work schedule shall be made as early in the day as possible for overtime work to be performed within that same workday; or made prior to the end of the day's operation when such a request will result in overtime service at the start of the following day: *Provided*, That an inspector may be recalled to his assignment after completion of his daily tour of duty under the provisions of § 307.6(b).

[40 FR 45799, Oct. 3, 1975, as amended at 40 FR 50719, Oct. 31, 1975; 41 FR 15401, Apr. 13, 1976; 48 FR 6893, Feb. 16, 1983; 51 FR 32304, Sept. 11, 1986]

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9 C.F.R. § 307.5 Overtime and holiday inspection service.

(a) The management of an official establishment, an importer, or an exporter shall reimburse the Program, at the rate specified in § 391.3, for the cost of the inspection service furnished on any holiday as specified in paragraph (b) of this section; or for more than 8 hours on any day, or

more than 40 hours in any administrative workweek Sunday through Saturday.

(b) Holidays for Federal employees shall be New Year's Day, January 1; Birthday of Martin Luther King, Jr., the third Monday in January; Washington's Birthday, the third Monday in February; Memorial Day, the last Monday in May; Independence Day, July 4; Labor Day, the first Monday in September; Columbus Day, the second Monday in October; Veterans' Day, November 11; Thanksgiving Day, the fourth Thursday in November; Christmas Day, December 25. When any of the above-listed holidays falls outside the basic workweek, the nearest workday within that week shall become a holiday.

[40 FR 45800, Oct. 3, 1975, as amended at 41 FR 15401, Apr. 13, 1976; 43 FR 51754, Nov. 7, 1978; 45 FR 65521, Oct. 3, 1980; 46 FR 1258, Jan. 6, 1981; 46 FR 46112, Sept. 17, 1981; 47 FR 44991, Oct. 13, 1982; 48 FR 44764, Sept. 30, 1983; 49 FR 1469, Jan. 12, 1984; 49 FR 38506, Sept. 28, 1984; 50 FR 724, Jan. 7, 1985; 50 FR 51513, Dec. 18, 1985; 52 FR 4, Jan. 2, 1987; 53 FR 13397, April 22, 1988; 54 FR 6389, Feb. 10, 1989]

SOURCE: 35 FR 15560, Oct. 3, 1970; 53 FR 13397, April 22, 1988; 56 FR 3195, Jan. 29, 1991, unless otherwise noted.

AUTHORITY: 7 U.S.C. 394, 21 U.S.C. 601-695; 7 CFR 2.17, 2.55.

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9 C.F.R. § 307.6 Basis of billing for overtime and holiday services.

(a) Each recipient of overtime or holiday inspection service, or both, shall be billed as provided for in § 307.5(a) and at the rates specified in § 391.3, in increments of quarter hours. For billing purposes, 8 or more minutes shall be considered a full quarter hour. Billing will be for each quarter hour of service rendered by each Program employee.

(b) Official establishments, importers, or exporters requesting and receiving the services of a Program employee after he has completed his day's assignment and left the premises, or called back to duty during any overtime or holiday period, shall be billed for a minimum of 2 hours overtime or holiday inspection service at the established rate.

(c) Bills are payable upon receipt and become delinquent 30 days from the date of the bill. Overtime or holiday inspection will not be performed for anyone having a delinquent account.

[40 FR 45800, Oct. 3, 1975; 54 FR 6389, Feb. 10, 1989]

SOURCE: 35 FR 15560, Oct. 3, 1970; 53 FR 13397, April 22, 1988; 56 FR 3195, Jan. 29, 1991, unless otherwise noted.

AUTHORITY: 7 U.S.C. 394, 21 U.S.C. 601-695; 7 CFR 2.17, 2.55.

9 C.F.R. § 322.2 Export certificates; instructions concerning issuance.

(a) Upon application of the exporter, the inspector in charge is authorized to issue official export certificates for shipments of inspected and passed product to any foreign country. Certificates should be issued at the time the products leave the official establishment; if not issued at that time they may be issued later only after identification and reinspection of the products.

(b) Official export certificates shall be issued with serial numbers and in triplicate form. Quadruplicate certificates may be issued for any exportation on request of the exporter. Each certificate shall show the names of the exporter and the consignee, the destination, the number and types of packages, the shipping marks, the kinds of products, and the weight of the products in accordance with § 317.2 of this subchapter.

(c) Only one certificate shall be issued for each consignment, except that for sufficient reasons new certificates in lieu of the original certificates may be issued. A certificate issued in lieu of another shall show in the left hand margin the notation "Issued in lieu of * * * ", and the number of the certificate which is superseded. The certificate that is superseded when another is issued in lieu thereof, shall if available, be surrendered to the inspector in charge and marked by him to show in the left hand margin the number of the certificate which supersedes it, as follows: "Superseded by No. ___".

(d) The original of the certificate shall be delivered to the shipper and may be furnished by him to the consignee for purposes of effecting the entry of product into the foreign country of destination.

(e) The duplicate of the certificate shall be delivered to the shipper and shall be delivered by the shipper to the agent of the railroad or other carrier which transports the consignment from the United States otherwise than by water, or to the chief officer of the vessel on which the export shipment is made, or to the vessel's agent and shall be used only by such carrier and only for the purpose of effecting the transportation of the consignment certified. The chief officer of the vessel or the vessel's agent, shipper or shipper's agent shall file such duplicate with the Customs officer within four (4) business days of the clearance of the vessel at the time of filing the complete manifest. In the interim period, the vessel will be cleared by Customs on the basis of a statement, under the shipper's or agent's letterhead, containing the number of boxes, the number of pounds, the product name and the USDA export certificate number that covers the shipment of the product. No clearance shall be given to a vessel carrying meat products unless either the duplicate of the certificate or the prescribed statement referencing the certificate has been presented to Customs.

(f) The triplicate of the certificate shall be retained in the circuit file.

(g) Under no circumstances shall the original or the triplicate of such certificate be used for the purpose prescribed by paragraph (e) of this section for the duplicate.

(h) Upon request, official export certificates may be issued by inspectors for export consignments of product of official establishments not under their supervision, provided the consignments are first identified as having been "U.S. inspected and passed" and are found to be neither

adulterated nor misbranded, and marked as required by § 322.1.

[35 FR 15604, Oct. 3, 1970, as amended at 42 FR 11826, Mar. 1, 1977; 51 FR 31938, Sept. 8, 1986]

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9 C.F.R. § 391.1 Scope and purpose.

Fees shall be charged by the Agency for certain specified inspection services provided on a holiday, on an overtime basis, and/or which are voluntary inspection services.

SOURCE: 54 FR 6390, Feb. 10, 1989; 58 FR 65269, Dec. 13, 1993; 71 FR 2142, Jan. 13, 2006, unless otherwise noted.

AUTHORITY: 7 U.S.C. 138f; 7 U.S.C. 1622, 1627 and 2219a; 21 U.S.C. 451 et seq.; 21 U.S.C. 601-695; 7 CFR 2.18 and 2.53.

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9 C.F.R. § 391.2 Base time rate.

The base time rate for inspection services provided pursuant to §§ 350.7, 351.8, 351.9, 352.5, 354.101, 355.12, and 362.5 is $47.79 per hour per program employee in fiscal year 2006, $48.84 per hour per program employee in fiscal year 2007, and $49.93 per hour per program employee in fiscal year 2008.

[55 FR 4411, Feb. 8, 1990; 56 FR 7300, Feb. 22, 1991; 57 FR 18388, April 30, 1992; 58 FR 33323, June 17, 1993; 59 FR 53727, Oct. 26, 1994; 60 FR 37329, July 20, 1995; 61 FR 65460, Dec. 13, 1996; 62 FR 6112, Feb. 11, 1997; 64 FR 19868, April 23, 1999; 64 FR 72494, Dec. 28, 1999; 65 FR

60095, Oct. 10, 2000; 67 FR 3430, Jan. 24, 2002; 68 FR 37956, June 26, 2003; 71 FR 2142, Jan. 13, 2006]

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9 C.F.R. § 391.3 Overtime and holiday rate.

The overtime and holiday rate for inspection services provided pursuant to §§ 307.5, 350.7, 351.8, 351.9, 352.5, 354.101, 355.12, 362.5 and 381.38 is $56.40 per hour per program employee in fiscal year 2006, $57.65 per hour per program employee in fiscal year 2007, and $58.93 per hour per program employee in fiscal year 2008.

[55 FR 4411, Feb. 8, 1990; 56 FR 7300, Feb. 22, 1991; 57 FR 18388, April 30, 1992; 58 FR 33323, June 17, 1993; 59 FR 53727, Oct. 26, 1994; 60 FR 37329, July 20, 1995; 61 FR 65460, Dec. 13, 1996; 62 FR 6112, Feb. 11, 1997; 64 FR 19868, April 23, 1999; 64 FR 72494, Dec. 28, 1999; 65 FR 60095, Oct. 10, 2000; 67 FR 3430, Jan. 24, 2002; 68 FR 37956, June 26, 2003; 71 FR 2142, Jan. 13, 2006]